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John W. Wade

THE DEMISE OF TRADITIONAL ANTITRUST LAW CONCEPTS
Nile Stanton

LEGAL PROBLEMS IN ORGAN TRANSPLANTS
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COMMENTS

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BRANDED: ARREST RECORDS OF THE UNCONVICTED

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VOLUME 44 NOVEMBER 1973 NUMBER 5

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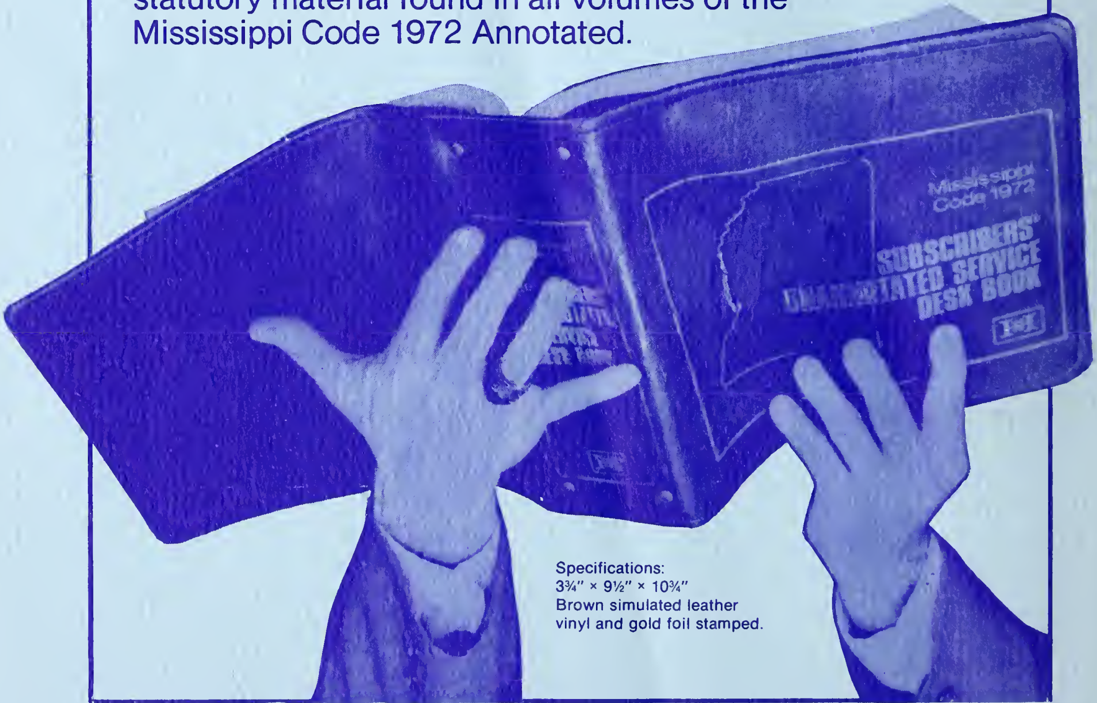

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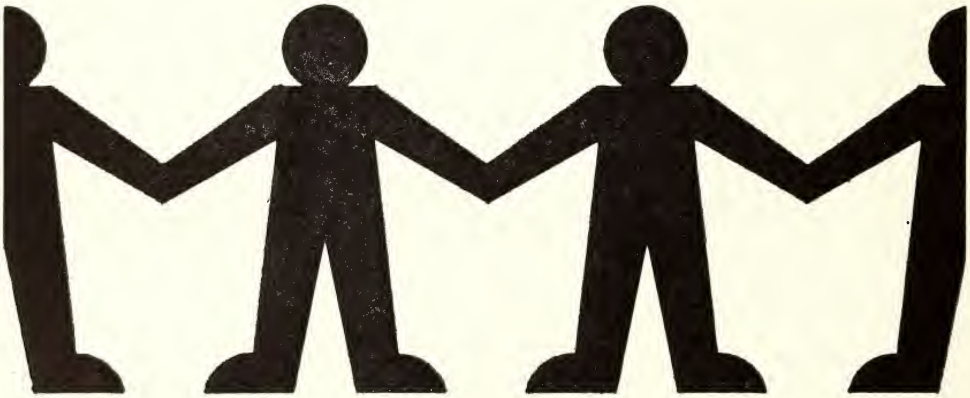

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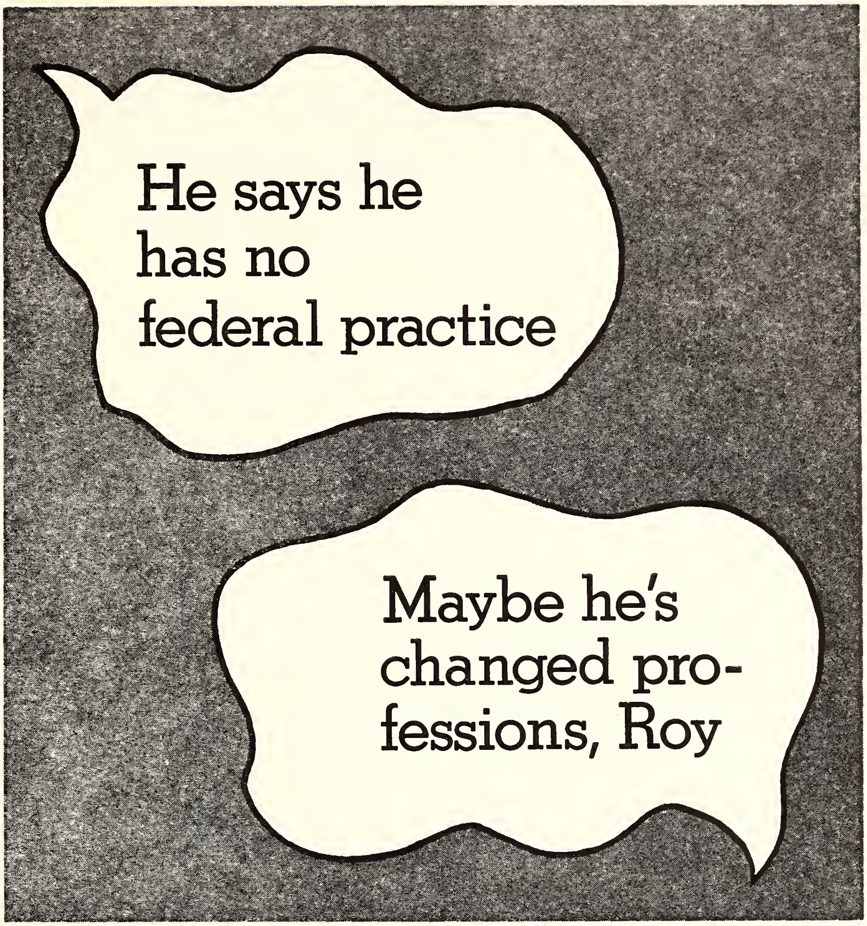
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ON THE NATURE OF STRICT TORT LIABILITY FOR PRODUCTS

*John W. Wade**

INTRODUCTION

In the area of the tort liability of a manufacturer or other supplier of a chattel for injury or damage caused by the chattel, strict liability in tort has swept the field in recent years. Privity of contract has disappeared as a requirement. Negligence liability has survived but is now often treated as a secondary line of attack to supplement the principal theory of strict liability and to fill in potential gaps or deficiencies.

This is not the occasion to trace the historical development — in negligence, from *Winterbottom*[1] to *MacPherson*[2] and beyond; in strict liability, from *Mazetti*[3] to *Heningsen*[4] to *Greenman*[5] and Section 402A of the Second Restatement.[6] That recounting has been very adequately done on several occasions in the past.[7]

The change from negligence to strict liability meant that it was no longer necessary to prove negligence on the part of the defendant. The prototype case was that in which something went wrong in the manufacturing process, so that the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be. No longer was it necessary to prove negligence on the part of some employee in the assembly line or in the system under which the line functioned or in failing to inspect the finished product adequately. For the supplier, too, there was no need to prove that he was negligent in failing to discover the dangerous condition of the product.

---

*Distinguished Professor of Law, Vanderbilt University. B.A. 1932, J.D. 1934, University of Mississippi; LL.M. 1935, S.J.D. 1942, Harvard University. Reporter, RESTATEMENT (SECOND) OF TORTS. Co-author, PROSSER AND WADE, CASES AND MATERIALS ON TORTS (5th ed. 1971).

[1] Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1849).

[2] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[3] Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). This was the first case to extend strict liability for food beyond privity of contract.

[4] Heningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[5] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[6] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[7] *See* Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966). There are numerous other treatments.

This suggests one of the prime reasons given for espousing the strict-liability approach. It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof. A second reason is suggested by the phrase "spread the risk." The idea is that the loss should not be allowed to remain with the injured party on whom it fortuitously fell, but should be transferred to the manufacturer, who, by pricing his product, can spread it among all the consumers. The extent to which a manufacturer may be free to "spread the risk" created by his product can be the subject of some debate. A different way of expressing essentially the same idea is to say that the activity of making the particular product should pay its own way, that the enterprise should bear the liability. Also similar is the argument regarding availability of insurance. That type of first-party insurance for automobile accidents, which is sometimes called no-fault insurance, is less available here, since the injured party would need to take out accident insurance in general; on the otherhand, the manufacturer can more easily obtain appropriate liability insurance coverage. Another argument involves the deterrent effect. Experience seems to demonstrate that if a manufacturer knows he will be held liable for injuries inflicted by his product, that product will be safer than if he understands that he can avoid liability by demonstrating the exercise of due care. There is also no good analogy to automobile accidents here, since a driver who is not deterred by the likelihood of injury to himself is hardly likely to be deterred by the thought of financial loss, especially if it would be covered by insurance.

Whatever the rationale, strict liability for products has become a significant portion of tort law. This type of strict liability differs in several respects from the strict liabiliy of the type arising from the case of *Rylands v. Fletcher*[8] (or that involving the keeping of dangerous animals). The latter type — whether the test is the penning up of a dangerous force seeking to get loose and cause mischief, or the making of a non-natural use of the land, or the conducting of an ultrahazardous activity, or the conducting of an abnormally dangerous activity — involves the deliberate engaging in an activity which is known to create serious dangers which cannot be eliminated by the exercise of ordinary care. The activity is one which is inappropriate to the place in which it is being carried on, but which has so much utility that the courts have not wanted to call it negligence. They have simply decided that it should pay its own way and compensate for the injuries which it imposes.[9] Its similarities to, and differences from, strict liability for products have not yet been clearly worked out by the courts or fully analyzed by the commentators.[10] Reference to some of them will be made subsequently.[11]

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[8] L.R. 1 Ex. 269 (Ex. Ch. 1866), *aff'd,* L.R. 3 H.L. 339 (1868).

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[9] *See generally, W. Prosser, The Principle of Rylands v. Fletcher,* in SELECTED TOPICS ON THE LAW OF TORTS 135 (1955); W. PROSSER, TORTS § 78 (4th ed. 1971).

[10] Until recently it could be argued that the trend was in the direction of expanding the scope of strict liability. *See* Peck, *Negligence and Liability Without Fault in Tort Law,* 46 WASH. L. REV. 225 (1971); Wade, *The Continuing Development of Strict Liability in Tort,* 22 ARK. L. REV. 233 (1968). But the development of automobile accident reparations statutes (no-fault insurance) with its first-party insurance, may be reversing the trend, and cutting down or even eliminating tort liability (whether negligence or strict liability). Will it expand to other areas? At least, it suggests that the prime motivating feature is compensation to the injured party.

[11] There have, during the past 12 months, been a number of largely theoretical studies of strict tort liability in general, urging its superiority over negligence as a principle for recovery. Thus, in Fletcher, *Fairness and Utility in Torts,* 85 HARV. L. REV. 537 (1972), the "paradigm of reciprocity" (strict liability) is contrasted with the "paradigm of reasonableness" (negligence). According to the first, *A* is strictly liable if he created a risk to *B* which was disproportionate to the risk which *B* created for him, while the second relies upon economic comparisons and forces *B* to bear the loss if utility to the community outweighs the harm to him. Epstein, *A Theory of Strict Liability,* 2 J. LEG. STUD. 151, 160 (1973), contends that "[i]f the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable just as he should pay in cases of certain harm where the decision to injure was reasonable," and then proceeds to build a system for determining causation. Calabresi & Hirschoff, *Toward A Test for Strict Liability in Torts,* 81 YALE L.J. 1055 (1972), takes an economic approach, looks for the "cheapest cost avoider" and finds that liability should be imposed upon the party who is better able to ". . . make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Posner, *Strict Liability: A Comment,* 2 J. LEG. STUD. 205 (1973), also seeks to analyze the economic consequences and to ascertain the "value-maximizing" or "efficient" solution. He believes that a principle of contributory negligence is necessary to this end, and concludes that "[e]conomic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability, provided that some version of a contributory negligence defense is recognized," but that "[a] strict liability standard without a contributory negligence is, in principle, less efficient than the negligence-contributory negligence standard." Mr. Posner declares himself "mystified" by the Calabresi approach. Mr. Calabresi speaks of Mr. Posner's "wonderful . . . fantastic world."

TESTS FOR APPLYING STRICT LIABILITY[12]

Strict liability for products is clearly not that of an insurer.[13] If it were, a plaintiff would need only to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him, an automobile manufacturer would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, anyone cut by a knife could sue the maker, and a purchaser of food with high calories would have an action for his overweight condition and for an ensuing heart attack. The liability would be like that created by a particularly stringent dramshop law.

There must be suitable ways of limiting the liability — both as to its initial existence and as to its scope and extent. The courts have had no difficulty in finding ways to do this. Scope and extent of liability have usually been controlled by the concepts of proximate cause or risk (including abnormal use) and of plaintiff's fault (including contributory negligence, assumption of risk, and misuse).[14] Original existence of liability is usually controlled by analyzing the nature of the product. It is this last approach which has proved most fruitful in solving the issues. And it is here that much of the dispute — and litigation — has arisen.

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[12] *See generally,* PROSSER, TORTS § 99 (4th ed. 1971); Dickerson, *The Basis of Strict Products Liability,* 1962 INS. L.J. 7; Dickerson, *Products Liability: How Good Does a Product Have to Be?,* 42 IND. L.J. 301 (1967); Freedman, *"Defect" in the Products: The Necessary Basis for Products Liability in Tort and in Warranty,* 33 TENN. L. REV. 323 (1966); P. Keeton, *Products Liability: Liability Without Fault and the Requirement of a Defect,* 41 TEXAS L. REV. 855 (1963); P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products,* 20 SYRACUSE L. REV. 559 (1969); P. Keeton, *Products Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30 (1973); Rheingold, *What Are the Consumer's "Reasonable Expectations?",* 22 BUS. LAW. 589 (1967); Rheingold, *Proof of Defect in Products Liability Cases,* 38 TENN. L. REV. 325 (1970); Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5 (1965), also in 32 ALA. LAW. 455 (1971); Comment, *Strict Products Liability—Its Application and Meaning,* 21 SW. L.J. 629 (1967); Note, *Products Liability and Section 402A of the Restatement of Torts,* 55 GEO. L.J. 286 (1966).

[13] Authorities for this are legion. *See, e.g.,* Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963); Courtois v. General Motors Corp., 37 N.J. 525, 182 A.2d 545 (1962).

[14] Even in strict liability of the *Rylands* type, liability is cut off by proximate cause (act of God or intervening action of a third party) and by assumption of risk. PROSSER, TORTS § 79 (4th ed. 1971).

The initial approach to the problem was in the language of the warranty cases. It was said that there was an implied warranty that the goods were of merchantable quality, or were suitable for the purpose for which they were sold. In the case of foodstuffs it was said that they must be wholesome. The reasonable expectations of the buyer were utilized as guidelines in making the determination.[15] But while the analogy was helpful in the strict liability cases it was not fully suitable. The implied warranty arose in a commercial setting. It involved primarily people who were contracting with each other. The suit was for commercial damages, for loss of bargain, because the product did not perform as expected. Tort damages for injury incurred were given only incidentally, as consequential damages. The test was not fully attuned to tort recovery. In many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made.

In *Greenman v. Yuba Power Products, Inc.,*[16] the first case expressly to espouse strict liabiliy in tort, Justice Traynor declared that liability would exist when the product ". . . proves to have a defect that causes injury to a human being."[17] This has been generally regarded as imposing a requirement that the product be "defective."

Section 402A of the Second Restatement of Torts was initiated prior to *Greenman,* but was published in official form subsequent to that case. This section requires that the product be "in a defective condition unreasonably dangerous to the user or consumer or to his property." For some time, *Greenman* and the Restatement were regarded as laying down the same test. But the Supreme Court of California has recently, in the case of *Cronin v. J.B.E. Olson Corp.,*[18] held that there is a difference between them, and that the California position is that the plaintiff needs to prove only that the product was defective, not that it was also unreasonably dangerous.[19] A re-evaluation of the test in the light of this case seems appropriate.

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[15] *See, e.g.,* Brayer v. Rath Packing Co., 321 Md. 105, 156 A.2d 442 (1959); Betchia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

[16] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[17] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[18] 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). *See also* Glass v. Ford Motor Co., 41 U.S.L.W. 2641, 2 CCH Prod. Liab. Rep. ¶ 6946 (N.J. Super. 1973).

[19] Conversely, in Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1969), the court holds that in a case involving a design alleged to be bad, the real question is whether the product was unreasonably dangerous, and that the ". . . court did not err in omitting any reference to a defect or defective condition." *Id.* at 947. *Cf.* Eschbach v. W. T. Grant's & Co., 2 CCH Prod. Liab. Rep. ¶ 6946 (3d Cir. 1973).

Quite obviously, what both sources are trying to say is that the product must be harmful or unsafe because of something wrong with it. The "something wrong" may have come about quite unintentionally because of a miscarriage in the manufacturing process, so that the product was not what it was intended to be; it may, on the other hand, have come about, even though the product was exactly as it was intended to be, because of a poor design or the failure to attach a warning or suitable instructions. The California court would read all of this into the single word "defective." The Restatement uses two expressions which may seem redundant. They might have been joined together with an "or" rather than an "and." But they were not; and this has created some problems of its own. Perhaps a review of the "legislative history" of the language of section 402 can be helpful. As initially prepared by the Reporter, Dean Prosser, and as unanimously approved by the Advisors, the section applied only to foodstuffs and the requirement was that the food be "in a condition dangerous to the consumer."[20] It was presented in this form to the Council 2 years later,[21] and the one word "dangerous" was there changed to read as it is in its present form. This is the way in which it was first published in a form open to the public and in which it first came to the Institute floor.[22] When the issue was raised on the floor, Dean Prosser explained that the Council was worried about liability for a product like whiskey, so that a "man who consumes it and gets delirium tremens" might recover because a jury "might find that all whiskey is unreasonably dangerous to the consumer." The word "defective" was added to ensure that it was understood that something had to be wrong with the product. The addition of the word "defective" was attacked on the floor of the Institute by Reed Dickerson, on the ground that the expression "unreasonably dangerous" was sufficient. Dean Prosser responded with an explanation of the action of the Council and the statement that he had been indifferent to the change. Mr. Dickerson was supported by Dean Lockhart and Professor Joiner,[23] but the Institute, tired after what had been a lengthy discussion of the section, decided by an uncounted voice vote not to make a change.[24] It may be significant that "defective condition" was defined in the comments in terms of being unreasonably dangerous, so that the terms came close to being synonymous, one explaining the meaning of the other.[25] Finally, it should be noted that the decision had been made while the section applied only to foods (so that "defective" was essentially the same as unwholesome), and that when the section was later broadened to include all products no reference was made again to this issue. Bad designs and lack of warning are of less significance in regard to food than they are in regard to many other products.

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[20] RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958).

[21] *Id.* (Council Draft No. 8, 1960).

[22] *Id.* (Tent. Draft No. 6, 1961).

[23] AMERICAN LAW INSTITUTE, 1961 PROCEEDINGS 87-89. *See also* Goodrich, J., concurring, in Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 302 (3d Cir. 1961). Judge Goodrich was then the Executive Director of the Institute and had participated in the Council discussion.

[24] There were numerous factors leading to this result. Mr. Dickerson, who made the motion, had spoken frequently and at length against parts of the section, and

If the two terms are regarded as not entirely synonymous, and it is either tautological or requiring too much to insist that the product be both defective and unreasonably dangerous, the question then arises as to which term is the more appropriate. There are difficulties with either one alone, as an analysis will show.

Thus, the term "defective" raises many difficulties. Its natural application would be limited to the situation in which something went wrong in the manufacturing process, so that the article was defective in the sense that the manufacturer had not intended it to be in that condition.[26] To apply it also to the case in which a warning is not at-

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President Tweed was urging the Institute to move on to a vote, because "we have been two hours and twenty-two minutes on this section."

[25] Thus, Comment *e* of § 402A, in Tentative Draft No. 6, declared that a defective condition exists "only where the food is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him . . . . Food is not in a defective condition when it is safe for normal handling and consumption." These two sentences, with minor changes, are also found in comments *g* and *h* of the official edition (1965).

[26] Thus, in Blissenbach v. Yanko, 90 Ohio App. 557, 48 Ohio Ops. 203, 107 N.E.2d 409 (1951), a vaporizer had a top which fitted loosely and did not screw on. When the plaintiff was injured by scalding water when the vaporizer was knocked over, the court held for the defendant, among other reasons, because the vaporizer was in the condition it was intended to be in and therefore was not defective. *Cf.* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967), holding that the jury might find it to be negligence to fail to adopt an alternative, safer design. And see LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd per curiam,* 407 F.2d 671 (3d Cir. 1969), in which a strict liability action was held to apply to a cotton jacket, not treated to make it fireproof. The defendant urged that section 402A required that the product be both defective and unreasonably dangerous and contended that the jacket was not "in a defective condition." The court agreed that the argument was possible but found that "defective product" and "unreasonably dangerous" might be used interchangeably. It then said, "Of course, the usual situation occurs when faulty manufacture results in something wrong with the product. But the basic design of a product, perfectly manufactured, is defective if it results in an unreasonably dangerous product for then an unreasonably dangerous product is synonymous with a defective condition. Thus there are two categories of defective products: (1) where a

tached to the chattel or the design turns out to be a bad one or the product is likely to be injurious in its normal condition, is to use the term in a Pickwickian sense, with a special, esoteric meaning of its own. It is not without reason that some people, in writing about it, speak of the requirement of being "legally defective," including the quotation marks. To have to define the term to the jury, with a meaning completely different from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to ensure that they will be misled.[27] In addition, a product may be defective and still not be likely to cause injury. An automobile, for example, may have something wrong with the ignition so that it will not start properly, or the clock or the radio may not work correctly. If so, it is obviously defective, but it is not harmfully defective. Perhaps the adverb "harmfully" needs to be added to the adjective. Without it, the test sounds more like one used in a commercial setting than in a tort setting. It suggests the idea of an action on a sales contract for rescission or for damages for loss of bargain. Finally, the term "defective" gives an illusion of certainty by suggesting a word with a purported specific meaning rather than a term connoting a standard involving the weighing of factors.

On the other hand, the term "unreasonably dangerous" raises difficulties of its own. It may suggest an idea like ultrahazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous. The California court suggests that it carries connotations of negligence, and thus nullifies the effect of setting up strict liability for products instead of requiring the plaintiff to prove negligence. It does,

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defect in the product results from a miscarriage of the manufacturing process, and (2) where the intended design of the product can be found to make the product unreasonably dangerous or not reasonably safe." *Id.* at 380. The point is not that the court reached the right result but that the word, defective, gave trouble.

[27] In the *Cronin* case, discussed *supra* at note 18, the trial judge had apparently given no explanation of the meaning of the word, defective, but the California Supreme Court affirmed a verdict for the plaintiff. The Court was convinced that the verdict was correct. It does seem to have been right on the facts, and a new trial would have been a formality.

Perhaps it is significant that in the case the injury was incurred because a safety catch was made of flawed metal ("extremely porous and extremely defective"). Suppose the design of the clasps had been such that they would not hold the bread trays in place against a very heavy, sudden force, and that the design was that intended by the defendant. Would the "defective terminology" then be adequate? Would it be meaningful to the jury without explanation?

however, indicate more clearly that we are dealing with a standard involving consideration of a number of factors.

There are other terms that might be used. For example, unsafe, or harmful, or injurious — or, in the case of foodstuffs, unwholesome. Like the original Restatement term "dangerous," these terms are subject to the objection that they might create liability on the part of the manufacturer of an ordinary knife on the ground that it cuts and therefore might injure somebody. The adverb "unreasonably" was added to the word "dangerous." If it connotates too strongly the idea of negligence, perhaps another adverb like "undue" could be used. In an earlier article, I had suggested the expression "not reasonably safe."[28] Today, I think I would offer the expression "not duly safe."

All of these terms seem to be much better than the word "defective." They are tort words, indicating the idea of causing tortious damage to someone, rather than the idea of a contract action for failure to receive what had been contracted for. They include the tort concept of creating a danger for a bystander, as well as one for the consumer who had purchased the chattel and therefore had at least an indirect contractual relationship.

Whatever word or phrase is used, a further explanation or indication of meaning is needed. In the absence of authorities on strict liability, early commentators resorted to cases based on warranty liability — whether express or implied. They thus used contract language. How good did the product have to be? What were the expectations of the parties? Are these actual expectations or reasonable ones? What might the manufacturer expect the consumer to expect? This is all warranty language. It essentially is a contract approach. It sounds as if the action is based on the ground that the buyer did not receive what he contracted for, so that he is entitled either to return it and get his money back or to keep it and sue for the difference between the value in its actual condition and the value it would have had if it had complied with his reasonable expectations. True, if the product caused injury, recovery might be had to compensate for it. But these are consequential damages, coming almost as an afterthought. Their availability may depend on the rules of *Hadley v. Baxendale*,[29] rather than those of proximate cause in tort. Under the warranty approach, there is no available basis for liability other than that for purchasers who might have had "expectations" from the manufacturer or supplier.[30]

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[28] Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L.J. 5, 15 (1965); *see* Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 55 (Mo. 1963).

[29] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

All of this might have been justified in the days when strict tort liability was in its formative stage. Now that strict liability has become the dominant theory, with a definite indication that the liability may apply for any user whether he is a purchaser or not, and even for bystanders who would be endangered and were injured by the product,[31] it is time to abandon the warranty way of thinking and its terminology just as we have abandoned other "impedimenta" of the warranty approach, such as required notice of defect within a reasonable time, and disclaimers.[32]

The time has now come to be forthright in using a tort way of thinking and tort terminology. There are several ways of doing it, and it is not difficult. The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else. In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact. Once given this notice of the dangerous condition of the chattel, the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it. Another way of saying this is to ask whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion.[33]

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[30] Another difficulty with the use of the term, expectations, is that it is likely to limit the requirement of safety to what is customary within the trade, on the basis that this is what the customer has come to expect. But the law should be that what is normally done by manufacturers, and therefore expected, while it may be adequate, is still not the standard. The "state of the art" is not controlling. *See* Gelsumino v. E. W. Bliss Co., 295 N.E.2d 110 (Ill. App. 1973). In negligence actions custom is admissible but is not the standard. *See* W. PROSSER, TORTS § 33 (4th ed. 1971). It would be unfortunate if the use of the term, expectations, would make the custom the standard in strict liability.

[31] *See, e.g.,* Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Elmore v. American Motors Corp., 70 Cal. 2d 820, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Lenhart v. Owens, 211 Kan. 534, 507 P.2d 318 (1973); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

[32] This can also produce the indirect benefit of refuting the commentators who continue to urge that judicial action in establishing strict liability and eliminating certain warranty restrictions is actually in violation of the Uniform Commercial Code and therefore beyond the power of the courts. *See, e.g.,* Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code,* 36 TENN. L. REV. 439 (1969); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code,* 17 WEST. RES. L. REV. 5 (1965); Titus, *Restatement (Second) Torts Section* 402*A and the Uniform Commercial Code,* 22 STAN. L. REV. 713 (1970). Surely the UCC was not intended to restrict judicial development of the common law of negligence. And if the courts set up a form of strict liability which is essentially negligence per se, and they contain tort theory and language throughout, the UCC cannot be applicable.

A possible initial impression that this is rank apostasy, amounting to an adbandonment of the strict-liability concept and a return to the negligence concept will be seen as erroneous on analysis. This suggested approach is similar to negligence per se in some instances — especially in the instance of the pure food laws. If the statute makes it a crime to sell deleterious or unwholesome food, there are holdings that a sale of food which is in that condition is negligence per se.[34] It makes no difference that the defendant was not negligent in letting the food get in an unwholesome condition and was not negligent in failing to find that it was unwholesome. Selling unwholesome food is negligence in itself, without anything more. This, by accurate analysis, is a form of strict liability. And it is strict liability, also, when a court declares, without the existence of a statute, that it is negligence to sell a product which lacks the attribute of due safety. A court clearly has this authority.[35] If by doing this it is really establishing strict liability, we might as well call it that and be accurate.

Incidentally, there is a real analogy here to the strict liability of the abnormally dangerous type. Strict liability is imposed there without the need of finding negligence. But the same sort of balancing process is used for determining whether to impose liability.[36] There are several

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[33] *See* Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 37 (1973).

[34] *See, e.g.,* McKenzie v. Peoples Baking Co., 205 S.C. 149, 31 S.E.2d 154 (1944); Doherty v. S. S. Kresge Co., 227 Wis. 661, 278 N.W. 437 (1938).

[35] *See* W. PROSSER, TORTS § 35 (4th ed. 1971).

[36] The factors to be weighed in determining whether an activity is abnormally dangerous are listed in Section 520 of the Second Restatement of Torts. Since it has not yet been published in official form, it is quoted here:

> §520. *Abnormally Dangerous Activities*
>
> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
> (b) whether the gravity of the harm which may result from it is likely to be great;
> (c) whether the risk cannot be eliminated by the exercise of reasonable care;
> (d) whether the activity is not a matter of common usage;

differences. One, the usefulness of the defendant's conduct is such that it is not stigmatized as negligent; it is simply required to pay its own way. Two, there is involved, not an intentional harm, but at least the intentional engaging in an activity in which the potential harm is an unavoidable risk.[37] And finally, the determination is made by the court, not the jury; the factors involved raise such policy issues that the courts are not willing to trust them to the jury. Here, too, we have something very like negligence per se; and other similarities to strict liability for products can be observed.[38]

To return to the relationship between negligence and strict liability for products, so far as the manufacturer is concerned, it is only when something has gone wrong with the manufacturing process and the product is not in the condition in which it was intended to be that there is any significant difference. In the case of the improper design which makes the product dangerous, whatever is enough to show that it is so dangerous that strict liability should apply (that it has a "defective design," to use the *Cronin* approach), will also be enough to show negligence on the part of the manufacturer.[39] Even if the manufacturer is not aware of the danger created by the bad design,

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(e) whether the activity is inappropriate to the place where it is carried on; and

(f) the value of the activity to the community.

RESTATEMENT (SECOND) OF TORTS, § 520 (Tent. Draft No. 10, 1964). *See* Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969); Siegler v. Kuhman, 81 Wash. 2d 448, 502 P.2d 1181 (1972).

[37] It has been suggested that there is really a similarity here with products liability arising from error in the manufacturing process. A manufacturer might set up an inspection procedure so specific and detailed as to catch all defects. Instead he deliberately establishes a procedure of spot-checking which he regards as sufficiently detailed as to catch most defects. *Cf.* Spangenberg, *Exploding Bottles,* 24 OHIO ST. L.J. 516, 533 (1963).

[38] *Cf.* W. Prosser, *The Principle of Rylands v. Fletcher,* in SELECTED TOPICS IN THE LAW OF TORTS 135, 181-84 (1953). In one case strict liability for products was limited to a product which was in an "extrahazardous condition." Wrights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965).

[39] This was almost certainly true in Greeman v. Yuba, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the seminal strict liability case. It involved a "shopsmith," or combination lathe machine, which had an improper design so that it did not always hold the piece of wood in place, but allowed it to fly out and hit the user. The trial court ruled that there was no evidence of negligence and submitted the case to the jury on the basis of implied warranty. It held for the plaintiff. Rather than reverse for a new trial on the negligence issue, the Supreme Court held that the recovery on the basis of implied warranty could be sustained instead on the basis of strict liability.

he is negligent in not learning of it.[40] This is also true if the product is unsafe because it did not carry a suitable warning or adequate instruction. The proof necessary to establish strict liability will certainly be sufficient to establish negligence liability as well. Indeed, the position of the California court in *Cronin,* in limiting the requirement to a defective product, would be much more sustainable if the strict liability for products which it applies were confined to the product which has its "defect" developed unintentionally in the manufacturing process, thus leaving the design and warning cases to be handled under the negligence techniques. There are thus innate similarities between the actions in negligence and in strict liability, and changing the terminology does not alter this.

If there is agreement that the determination of whether a product is unreasonably dangerous, or is not duly safe, involves the necessary application of a standard, it will, like the determination of negligence or of strict liability for an abnormally dangerous activity, require the consideration and weighing of a number of factors. I offer here a revised list of factors which seem to me to be of significance in applying the standard:[41]

(1) The usefulness and desirability of the product — its utility to the user and to the public as a whole.

(2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

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[40] This is true of the manufacturer, not necessarily of a subsequent supplier.

[41] The first enumeration of factors was offered in Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L.J. 5, 17 (1965), also in 32 Ala. Law. 455, 469 (1971). Compare the factors listed in the Second Restatement for determining negligence (§§ 291-93) and an abnormally dangerous activity (§ 520, quoted *supra* note 36).

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[42]

If these factors are to be weighed in the application of the standard, how are they actually to be used in the trial of a case? This necessitates a consideration of the relative functions of judge and jury.

JUDGE AND JURY

In an action for negligence it is normally the function of the jury to determine whether the defendant was negligent, subject, of course, to the authority of the judge to direct a verdict for the defendant, if he finds that the jury could not reasonably find for the plaintiff. On the other hand, in an action based on strict liability of the *Rylands* type, for an abnormally dangerous activity, the determination as to whether strict liability will be imposed for the activity is held to be one for the judge, not the jury — for the reason that the decision involves issues of general social policy.[43] In the products cases the courts seem not to have approached the problem in this fashion. Instead, they seem to have assumed that strict products liability is like negligence in this respect, so that a plaintiff, in order to recover, must convince the jury that the product was "defective" or "unreasonably dangerous" or "not duly safe," or whatever test is used. This generally works quite satisfactorily when the question is whether the product was unsafe because of an error in the manufacturing process so that it was not in the condition in which it was intended to be. The issue then seems more factual, of the kind the jury is accustomed to handling. The difficulty comes when it is not just the single article which is to be classed as unsafe because something went wrong in the making of it, but a whole group or class or type which may be unsafe because of the nature of the design. It is here that the policy issues become very important and the factors which were enumerated above must be collected and carefully weighed. It is here that the court — whether trial or appellate — does consider these issues in deciding whether to submit the case to the jury. If a plaintiff sues the manufacturer of a butcher knife because he cut his finger, on the sole ground that the knife was so sharp that it was likely to cut human flesh, the court would probably take the case out of the hands of the jury and not give it the opportunity to find that the knife was unsafe. Similarly with an aspirin manufacturer, when an ordinary tablet stuck to the lining of the plaintiff's stomach and caused a hemorrhage, or the manufacturer of the Pasteur treatment for rabies, when there were untoward reactions. The problem in these cases is likely to be called one of law and decided by the court. Court control of jury action is more extensive here than in the ordinary negligence action. And yet, of course, if the court decides that it would be reasonable to allow the jury to find for the plaintiff, the issue of lack of due safety will be submitted to the jury even in these cases.[44]

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[42] This last factor was not in the initial compilation. But it is certainly a circumstance which may influence the court's decision on occasion. Two illustrations: Probably it has been in the mind of the court in some of the blood cases. Section 402A is expressly limited to one who "is engaged in the business of selling such a product."

[43] RESTATEMENT (SECOND) OF TORTS § 520, comment 1 (Tent. Draft No. 10, 1964).

When the issue of lack of due safety is submitted to the jury, what should be said in the instructions? The instruction will obviously use the term or terms sanctioned in the state for expressing the test — e.g., unreasonably dangerous, not duly safe, defective (in the manufacture or design). But these terms are usually not enough to give the jury an adequate impression as to the test which they are applying. Something more is needed. Prior to *Cronin,* the California-approved instructions defined unreasonably dangerous as being "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[45] (Under *Cronin,* with the elimination of the requirement that the product be unreasonably dangerous, this definition will apparently go out, but something at least similar will have to be substituted; the term "defective" without any explanation, will provide practically no guidance to the jury and may be quite misleading).

The California instruction is not unsatisfactory, but it has at least two drawbacks. First, it gives something of an impression that the product must be specially or unusually dangerous. This, it would seem, is the real reason why the court in *Cronin* discarded it. Second, like all definitions in terms of consumer expectations it carries a flavor of commercial loss rather than tort injury and seems to confine the scope of liability to those who "consume" the product. There is also a hint of reliance on an undertaking by the defendant — an element which does not need to be present.

The following may be offered as a substitute: "A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe."[46] This language gives the tort flavor. It uses the familiar concept of a reasonable prudent man; which juries have always been able to handle; but it differentiates clearly between negligence and strict liability. It applies equally to manufacturing errors and bad designs.[47] It is clearly objective in nature, giving no hint of depending on the subjective expectations of either party.

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[44] *See* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

[45] BAJI No. 9.00 (5th Rev. ed., Richards, 1969). This is quoted in footnote 9 of the opinion in the *Cronin* case.

Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements.[48] This analysis is most helpful and can be used with profit by trial and appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead, they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances. Occasionally, when one of the factors has especial significance, it may be appropriate for the judge to make reference to it in suitable language. For example, in factor number 6, if the dangerous condition of the product is perfectly apparent, the judge might refer to this in telling the jury that they are to decide whether a reasonable prudent man would put the product on the market, or whether its danger was so great that it ought not to be marketed at all, despite the obviousness of the danger.

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[46] Compare the instruction given in Welch v. Outboard Marine Corp., 2 CCH PROD. LIAB. REP. ¶ 6940 (5th Cir. 1973): "[A] condition is unreasonably dangerous so as to constitute a defective condition when it is so dangerous that a reasonable man would not sell the product if he knew of the risks involved. . . . To put it another way, a product is unreasonably dangerous if it is dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics." *Id.* The court of appeals said in approving it: "[S]ince the test for imposing strict liability is whether the product was 'not reasonably safe,' this test characterizes the seller's or manufacturer's conduct as well as the product. If the defendant has actual or constructive knowledge of the condition of the product, it would be unreasonable for him to sell it." *Id.* And see Borel v. Fibreboard Paper Prod. Corp., No. 72-1942 (5th Cir., Sept. 10, 1973); Helene Curtis Indus. Inc. v. Pruitt, 385 F.2d 841, 850 (5th Cir. 1967); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 605 (Tex. 1972); and the Keeton and Wade articles, *supra* note 12.

[47] In this instruction, it is entirely possible to use the word defective, if wished, especially in the case where the manufacturing process went awry.

[48] *See* RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965).

RECURRING FACTS PATTERNS

There may be usefulness now in discussing some typical fact patterns and offering a few brief, somewhat random comments. In each of the situations, the suggested list of factors for the use of the court and suggested instructions for the use of the jury are applicable. The remarks provide other comments. And the classifications are not regarded as mutually exclusive; they often overlap.

1. *Product not in intended condition.* This is the case in which something went wrong in the manufacturing process. Here, the distinction between negligence and strict liability is most significant. Here, the adjective "defective" is both meaningful and useful in describing the product. The defendant is not likely to fight as hard here as in some of the other examples because the decision will not normally affect numerous other cases. The plaintiff's primary difficulty is likely to come in connection with proof of cause in fact — that the chattel was indeed in the unsafe condition at the time it left the defendant.[49]

2. *Improper design.* There is little difference here between the negligence action and the action for strict liability.[50] This is true, at least, for the manufacturer, who normally either knows of the danger which the design creates or should know (i.e., is negligent in not knowing of it); it is less true of a supplier, who may take the product from the manufacturer without inspecting it in detail. Under design is included the failure to provide proper safety devices.[51] Design may include the parts or elements which do or do not go into the make-up of a product, if it is intended to be in that condition.[52]

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[49] *See, e.g.,* Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1960); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972).

[50] Thus, in Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973), where South Dakota adopted the theory of strict liability and applied it to an unsafe design, a concurring judge felt that the case should be handled on the basis of negligence alone. *Cf.* Libby-Owens Ford Glass Co. v. L&M Paper Co., 205 N.W.2d 523 (Neb. 1973) (negligence). *See generally* Noel, *Recent Trends in Manufacturer's Negligence as to Design, Instructions or Warning,* 19 Sw. L.J. 43 (1965).

[51] Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972); Wheeler v. Standard Tool & Supply Co., 2 CCH PROD. LIAB. REP. ¶ 6931 (S.D.N.Y. 1973).

[52] In LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd,* 307 F.2d 671 (3d Cir. 1969), boys' jackets were not treated with chemicals to make them nonflamable. Though this was the intended make-up of the jacket it was held to be an unsafe design.

3. *Warnings and instructions.* The addition of a suitable warning may cause an otherwise unsafe product to be characterized as duly safe. It may be appropriately used when the dangerous condition of the product cannot feasibly be eliminated. But a warning will not always be sufficient. An electrical appliance with uninsulated wires would not be made duly safe by attaching a warning to look out for the danger of electric shock. Some products may be so inherently dangerous that they should not be marketed at all, whether with or without a warning. The form of the warning may be important — its clarity, its prominence, whether it is attached to the product or is provided separately.[53] Instructions are similar to warnings. If the product must be used in a particular way to be safe and this necessity would not be apparent to the user, adequate instructions may be required for the product to be duly safe.[54]

As in the design cases, there is little difference for the manufacturer (as distinguished from the supplier) in an action for negligence and one for strict liability. Indeed, the absence of appropriate warnings or instructions is sometimes classified as a "design defect."

4. *Commonly known and obvious dangers.* If a danger in the use of a particular product is a matter of common knowledge and the public is fully aware of it and still freely buys the product, then the product may well be found to be duly safe. Two common products where this may well be true today, for example, are liquor and the danger of alcoholism, and cigarettes and the danger of lung cancer. General knowledge and common expectations may well be controlling, especially if the danger is confined to the user, who knowingly subjects himself to it, and the dangerous condition cannot be avoided.

Different from and yet sufficiently similar to the commonly known danger to be classified with it is the product which has a danger which is perfectly apparent to the user. Thus the dangers of a hoe or an axe are both matters of common knowledge and fully apparent to the user.[55] But it is not necessarily sufficient to render a product duly safe that its dangers are obvious, especially if the dangerous condition could have been eliminated.[56] A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade would not be treated as duly safe, despite the obvious character of the danger.[57]

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[53] As to adequacy of warning, see Tucson Indus., Inc. v. Schwartz, 108 Ariz. 464, 501 P.2d 936 (1972); Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963). As to whom the warning should be given see Davis v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968). As to the effect of presence or absence of a warning when the product is unavoidably dangerous, see Borel v. Fibreboard Paper Prod. Corp., No. 72-1942 (5th Cir., Sept. 10, 1973).

[54] As to the relationship of a warning and an instruction for use, *see* McCully v. Fuller Brush Co., 68 Wash. 2d 675, 415 P.2d 7 (1966).

[55] *See, e.g.,* Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971) (meat grinder); Garrett v. Nissen Corp., 498 P.2d 1359 (N.M. 1972) (trampoline).

Note that the question here is whether the product possesses the quality of due safety, not whether the plaintiff assumed the risk or was contributorily negligent. That latter question arises for consideration only after the decision is reached that the product was not duly safe. It makes no difference whether plaintiff's fault is a valid defense to an action for strict products liability, so long as the question as to the due safety of the product is the first one to be answered.

5. *Natural products.* Reference is sometimes made to the fact that a product is in a natural condition, as if the dangers inherent in it are then not sufficient to make it unduly unsafe. Examples are strawberries, or butter, or bones in meat products.[58] It may be suggested that this is not a very helpful classification. Cases in which liability should not be imposed can be more adequately explained on the basis of some other fact pattern. To set this up as a significant classification is to send the courts down the trail of determining an unimportant side issue. Is butter in a natural condition? Are pork chops? Is liquor? It is better to attack the problem more directly.

6. *New products and established products.* An established product, especially if it is of a household nature, is very likely to come within classification number 4; its dangers will be a matter of common knowledge. This pattern is not true of a product which is new to the market. But from a practical standpoint, the difference between the two is likely to be carried further than to matters of common knowledge. Few people know, for example, that ordinary aspirin, if taken on an empty stomach and without much liquid, can adhere to the lining of the stomach and cause a hemorrhage. Despite the esoteric nature of this knowledge, it seems far less likely that the manufacturer of an aspirin tablet would be held liable for a hemorrhage that than the manufacturer of an entirely new drug would. Even with the aspirin, however, it is possible that the

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[56] The question here is similar to that as to whether a warning is sufficient to make a product duly safe. Compare RESTATEMENT (SECOND) OF TORTS § 343A (1965), as to a landowner's liability to an invitee for known or obvious dangers.

[57] Contrast the two recent lawnmower cases of Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); and Denton v. Bachtold Bros. Inc., 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972). They involved a more established design.

[58] For cases, *see* DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.2 (1951).

failure to provide suitable instructions as to how to take it might be held to be a basis for liability.

7. *Product unavoidably dangerous.* The problem here is not whether the product is unsafe but whether it is unduly unsafe. This issue is clearly a policy one, and the various factors listed earlier must be carefully weighed. Is the general social usefulness of the product so great that it should not be required to pay for the injuries of this type, if they cannot be avoided? This is a decision which a court hesitates to entrust to a jury, and decisions of the court may be regarded as having precedential value.[59]

Potentially helpful distinctions may be raised by questions like the following: Is the dangerous aspect of the product inherent in the useful or desirable feature of the product (a knife, for example)? Is the unavoidably dangerous aspect a side effect (a drug sometimes causing nausea or affecting eyesight, for example)? Is the unavoidable danger one which depends upon the way in which the product is used (the knife, again, or a match)? Is the dangerous aspect commonly known? Is the product vital to the consumer, or can he freely take it or leave it as he sees fit?

8. *Dangerous condition not discoverable.* Two hypothetical situations are distinguishable here. (a) A drug company, introducing a new drug, has tested it with due care. After the drug is placed on the market, it turns out to have the propensity of producing cataracts in some people. Due care is not sufficient to relieve the defendant if it has not been learned that the drug produces cataracts, since the propensity of the drug is not really undiscoverable. This situation may be treated in terms of whether the dangerous propensity of the drug can be eliminated (pattern classification 7) or the effect of the fact that only a small number of people are affected adversely (pattern classification 9). (b) A blood bank knows that blood plasma may contain hepatitis germs but it has no way of discovering whether a particular pint is infected or not. Not all blood plasma is infected by hepatitis, though it is known that some may be. The consumer can be informed of the nature of the danger and of the fact that it cannot be eliminated.

In the first situation the suggested test of having the law supply the scienter and then determining whether the supplier was negligent in supplying the product seems appropriate. In the second, a court which wished to do so might appropriately decide that the knowledge which is constructively supplied is that of the potential danger involved in any pint of plasma, not the exact condition of this particular pint; the only way to ascertain that is by making the transfusion in a human being.[60] But even though the scienter of the condition of this pint is supplied, there are still other questions which must be considered prior to a determination of whether the plasma meets the standard of being duly safe.[61]

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[59] On when a decision as to negligence (or that a product is not duly safe) has precedential value see Qualcast, Ltd. v. Haynes, (1959) A.C. 743, [1959] 2 All E. R. 38 (H.L.)

9. *Product dangerous to only some people.* The major group of cases coming within this fact pattern classification are those involving allergic reactions. Here there is a wide division of opinion. One position is that a product is duly safe if it is safe for the normal person. At the other extreme is the position that the manufacturer should be liable for all allergic reactions, no matter how rare they are. The negligence cases are usually somewhere in between, and there seems little reason to treat the cases differently under the two theories.[62]

In reaching a decision consideration should be given to questions such as these: How many people are likely to be affected? How serious is the likely injury — a temporary skin rash or a permanent bodily change? How valuable is the product — a life preserving drug or an ordinary cosmetic? Can a listing of the ingredients identify the allergy so that a person who is aware of his allergy can avoid the product? Can the offending ingredient be eliminated? These questions emphasize some of the factors which have been previously enumerated.

Another group of cases coming within this classification involves products which are not safe to be handled by children. A warning to keep the product out of the hands of children may be sufficient. A lockcap so that children cannot reach the contents of a bottle is a recent development.[63]

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[60] Of course, this need not be the position taken. The Illinois court held the defendant liable in strict liability, in Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970), and a number of courts have followed the same position since.

[61] Obviously, there has been no attempt here to collect and evaluate materials on the medical and scientific state of development, or of the legal authorities. For a recent treatment, see Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 STAN. L. REV. 439 (1972). The attempt has been merely to show how the problem should be posed for court and jury, without covering up policy issues by such devices as the sale-service gambit.

Generally, on this and the two preceding classifications, *see* P. Keeton, *Products Liability — Drugs and Cosmetics,* 25 VAND. L. REV. 131 (1972).

[62] Allergy cases are collected and described in Freedman, *Allergy and Products Liability Today,* 32 OHIO ST. L.J. 431 (1963); Noel, *The Duty to Warn Allergic Users of Products,* 12 VAND. L. REV. 331 (1959); Whitmore, *Allergy and Other Reactions to Drugs and Cosmetics,* 19 SW. L.J. 76 (1965). A recent case is Robbins v. Alberto-Culver Co., 210 Kan. 147, 499 P.2d 1080 (1972).

10. *Misuse of product.* This is a legal concept which is itself frequently misused. Suppose that a consumer buys and wears shoes that are too little or tires that are too large for his automobile, or that he uses the product without following instructions. If he is injured as a result and brings suit, the problem may be posed in terms of whether he was at fault and whether his fault should bar recovery in an action based on strict liability. The initial, and really significant, problem is whether the product was duly safe or not. A good pair of shoes size 5 is not unduly unsafe because it may be worn by a woman with feet size 7, and the manufacturer should not be held liable unless he was negligent in selling this particular pair of shoes to this particular woman; similarly with the tires.[64] A product with adequate instructions for its safe use may as a result be duly safe, and it is not rendered unsafe by the fact that the consumer did not follow the instructions.[65] Only after it has been determined that the product was not duly safe should the question of plaintiff's fault arise.

Further illustrations easily present themselves. There is no drug, and perhaps no food, that is not dangerous if too much of it is consumed.[66] It is missing the real point to pose the issue in terms of whether the plaintiff was contributorily negligent in taking too many pills or too much food. Any working machinery should be kept in a state of good repair. The real issue is whether it is duly safe, even though it may become dangerous if not in a state of good repair; not whether the user was contributorily negligent.

11. *Abnormal use of product.* This is like misuse. Here, too, accurate analysis is important. The initial question to be determined is whether the product is duly safe. It should be duly safe for at least the normal uses to which it would be put. If it is found to be not duly safe, there may then be a further question of proximate cause — whether the

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[63] *See generally* the discussion in Pitts v. Basile, 35 Ill. 2d. 49, 219 N.E.2d 472 (1966).

[64] *See* McDevitt v. Standard Oil Co. of Texas, 391 F.2d 364 (5th Cir. 1968) (tires); McLaughlin v. Sears, Roebuck & Co., 111 N.H. 265, 281 A.2d 587 (1971); Dubbs v. Zak Bros. Co., 38 Ohio App. 299, 175 N.E. 626 (1931) (shoes).

[65] Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967).

[66] In Carter v. Metropolitan Dade County, 253 So. 2d 920 (Fla. App. 1971), *cert. denied,* 263 So. 2d 584 (1972), a drug manufacturer was held not liable when the injured party was given 3 to 4 times the recommended dose.

injury which was incurred came within the scope of the risk of the dangerous condition of the product.[67]

Some courts have spoken of the intended use of the product. And the intent is sometimes restricted to that of the manufacturer, thus affording him the opportunity to limit the scope of his liability.[68] Once again, this sounds more like an action for breach of contract than a tort action. In substitution for the term "intended use," other adjectives may be used — expected, anticipated, normal, foreseeable; note how they become broader in their scope. For an action based upon negligence it would seem that a manufacturer should be held to the duty of seeking to make his product duly safe for uses which might be reasonably foreseen. Of course, it may be argued that for strict liability, which is imposed on an objective basis without having to find negligent conduct, a narrower scope as to the nature of the use may be appropriate. The other view seems better, and reference may be made again to the suggested standard of what a reasonable prudent man would do, assuming that he had knowledge of the dangerous condition of the chattel.[69]

It is appropriate to remark here that a court which seeks to impose liability for any product which is unsafe, without consideration of whether that lack of safety is due or reasonable, will find other means of controlling the extent of the liability. One of the ways of doing this is to speak of proximate cause or to limit the scope of the risk on the basis of a more restricted type of use to which the liability will extend. It seems much better to bring the policy elements out into the open by giving consideration to the factors to be weighed in determining whether the product is duly safe.

The problem in this area is presented vividly, and with a sharp split of authority, in connection with the so-called "crashworthy car" argument. In designing an automobile, does a manufacturer need to anticipate that it may be involved in a collision and to prepare that design to alleviate the effects of the collision? One line of authority holds that he does not, that a collision is not an intended use of the automobile and that there is no requirement that the car be "accident proof or fool-proof."[70] The other line of authority declare that automobile collisions are to be anticipated and that a manufacturer must take this into consideration in planning his design.[71] The second position seems clearly correct. But it should be borne in mind that the requirement is not that the car be completely accident-proof or crashworthy; that would be to impose an impossible task. Instead, the requirement is that the design provide due safety, taking into consideration the possibility of a crash. And the standard of due safety involves a weighing of the enumerated factors.

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[67] *See* Dickerson, *Products Liability: How Good Does a Product Have to Be?* 42 Ind. L.J. 301, 308 (1967).

[68] *See, e.g.,* Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946).

[69] For discussion and cases, *see* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk,* 25 Vand. L. Rev. 93 (1972); Noel, *Products Liability: Bystanders, Contributory Fault and Unintended Uses,* 50 F.R.D. 321, 332 (1971).

12. *Product subject to processing by third party.* The maker of a constituent part of a product is subject to liability if that part is not duly safe. The maker of the defective spoke in Mr. McPherson's car should be liable to him. But the supplier of lumber to the spokesmaker would not be held liable simply because there were knots in the lumber.[72] The spokesmaker would then be processing the raw material, and it would be appropriate to shift to him the responsibility to the injured party. The problem here is similar to that covered by Section 452 (2) of the Second Restatement of Torts, and the policies involved are also similar.

13. *Product wears out.* The reference here is limited to the situation in which the plaintiff is physically injured as a result of the break-down of the product; it does not apply to an action for loss of bargain because the product was not as good as it was supposed to be. The question again is whether the product was duly safe. It cannot be expected to last forever, but only in accordance with normal expectations and with customary maintenance. In appropriate cases, due safety might require a warning as to the length of life or perhaps a warning device to indicate that an important part was weakening.[73]

14. *Used products.* As between a buyer and seller the answer would normally depend upon the nature of the contract. Was the product sold

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[70] The leading case is Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966). *See also* Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Walton v. Chrysler Motors Corp., 229 So. 2d 568 (Miss. 1970).

[71] The leading case is Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See also* Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1971); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

[72] *Cf.* Stultz v. Benson Lbr. Co., 6 Cal. 2d 688, 59 P.2d 100 (1936). *See also* Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822 (1958); *cf.* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[73] *See generally* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); McNally v. Chrysler Motor Corp., 55 Misc. 2d 128, 284 N.Y.S.2d 761 (1967).

"as is" or was it sold as a product which was expected to be reasonably safe?[74] But as to third parties there might be a different application. If one sells or rents a car without good brakes, expecting it to be immediately driven out in the street, he might be liable if a third party were injured as a result of the bad brakes.[75]

15. *Container or packaging.* It is now, very appropriately, held that the product includes the container or packaging. It, too, must be duly safe or liability will be imposed.[76]

CONCLUSION

This article has treated only one element of the action of strict liability in tort for products — the subject of the nature of strict liability, or what kind of conduct on the part of a supplier will subject him to strict liability. There are numerous other questions involved in an action for strict liability: the question of cause in fact, or the matter of proof that the product was in an unsafe condition when it left the defendant; the question of proximate cause — forseeability of the injury and scope of the risk created by the dangerous condition; the question of interests protected — whether they include physical harm only, or also economic loss and loss of bargain; the question of the effect of plaintiff's fault — assumption of risk and contributory negligence; the question of parties involved — parties plaintiff and parties defendant; and the question of expansion of the concept of strict liability beyond sales to other types of transactions such as bailments and leases and building contracts and service contracts. But the question as to the nature of the strict liability is certainly the most important one, and the whole action is built on it.

There presently exist three separate tort actions on which recovery can be had by an injured consumer against a supplier of a product. They are negligence, breach of warranty, and strict liability. All three are available in many states and at least two in most states. Where the state procedure permits, a separate count on each theory may be brought in a single complaint. Each of the three theories may have certain advantages and certain disadvantages for the plaintiff, who in filing the complaint chooses among them. The confusion created by these conflicting advantages and disadvantages cannot really be justified. As time goes on and we have more experience with the more recently developed theories, they will surely begin to merge together into a single tort action. The action for breach of warranty (in the non-privity situation) already seems to be fading into the action for strict liability, with the warranty terminology and legal complications being elided. And the major real difference between negligence and strict liability is the matter of scienter or knowledge of the dangerous condition of the product. In the case of the pure-food statutes, this is taken care of by the doctrine of negligence per se. One who sells unwholesome food is negligent. But the concept of negligence per se does not require a statute. Negligence has steadily become objective. The time will probably come when courts are ready to declare that one who supplies a product which is unduly unsafe is negligent per se. Selling a product which is not duly safe is negligence within itself, and no more needs to be proved. Whether this is called negligence or strict liability is not really significant.

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[74] *See* Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

[75] *See* Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1953); Fleming v. Stoddard Wendle Motor Co., 70 Wash. 2d 465, 423 P.2d 926 (1967).

[76] Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961); Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967); Gillespie v. Great Atlantic & Pacific Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

At that time we would have a single cause of action which combines the desirable attributes of the three types of action that are now available. There is one possible exception which may create a serious problem. That is the question of the effect to be given to contributory fault on the part of the plaintiff. Presently, the situation in this regard is "simply monstrous" — to adopt an expression which Judge Learned Hand liked to use on the Institute floor. If the plaintiff sues in negligence and the defendant proves contributory negligence, the plaintiff can recover nothing. If on exactly the same facts he merely changes his language and sues on the basis of strict liability, he recovers the full amount of his damages. Both results may be unjust, and there is no justice in saying that they balance each other out.[77] A fair and consistent solution is urgently needed.

That solution should be apparent on reflection. It is to apply a system of comparative fault of the "pure type"[78] and to apply it to strict liability as well as to negligence.[79] Fortunately, there is already real progress in this direction. Legislatures of a number of states have recently adopted comparative negligence statutes,[80] and the National Conference of Commissioners on Uniform State Laws has established a special committee to work on a uniform comparative fault act. At least one state supreme court has judicially adopted comparative negligence.[81] Will this action be the start of an important trend? But that is another story, and the end of one article is not the place to begin another one.

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[77] *See generally* Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk,* 25 VAND. L. REV. 93 (1972); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct,* 1968 UTAH L. REV. 267.

[78] The pure type of comparative negligence allows recovery by a plaintiff even though his negligence may be greater than that of the defendant. This is the Mississippi rule as distinguished from the Wisconsin rule.

[79] Applying comparative negligence to an action of strict products liability, *see* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

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[80] There is a strong current trend to adopt comparative negligence in New England, and also in such other diverse states as Hawaii, Minnesota, Oregon, and Texas.

[81] Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); *cf.* O'Brien v. Bethlehem Steel Corp., 59 N.J. 114, 279 A.2d 827 (1971) (Francis, J., concurring); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 446 (1973).

In Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968), a divided court held that if a change was to be made it must be left to the legislature. Several other courts have agreed, but usually with a special opinion of some judge warning that if the legislature does not act soon the court may have to step in. *See* W. PROSSER & WADE, CASES ON TORTS 531 n.1 (5th ed. 1971). On the Maki case there is a symposium at 21 VAND. L. REV. 889-949 (1968), with comments by Professors James, Kalven, R. Keeton, Leflar, Malone, and Wade.

In the light of the Florida case cited at the beginning of this note, it may be pertinent to recall that the same court in Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), started the trend toward judicial abolition of governmental tort immunity.

THE DEMISE OF TRADITIONAL ANTITRUST LAW CONCEPTS

*Nile Stanton**

I. INTRODUCTION

The scandalous predatory practices of some industrial giants and money magnates in the second half of the 19th century precipitated a mood in America which lead, in 1890, to the passage of the Sherman Anti-Trust Act.[1] Section 2 of the Sherman Act made it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce. . . ."[2] In the first case to reach the United States Supreme Court under the Sherman Act, *United States v. E. C. Knight Co.,*[3] the Court construed the Act narrowly and refused to break up the "Sugar Trust" on the ground that mere refining was not "commerce." Thus, the American Sugar Refining Company was allowed to maintain its control over 98 percent of the nation's sugar refining. Two years later, however, in a 5-4 opinion, the Court revitalized the Sherman Act — and gravely frightened big businessmen — by suggesting that the Act proscribed *all* restraints on trade,[4] a position from which it wisely departed in announcing the "rule of reason" test in 1911.[5]

It thus became clear that America was to retreat from a short-lived era of a near *laissez faire* economy[6] and, concomitantly, that oligopolistic and monopolistic practices would probably evoke the wrath of the federal judiciary. And who would maintain that monopolization should be sanctioned in America? Monopolization misallocates human resources by restricting employment opportunities and business ventures. It produces profits for companies beyond the amounts for which they perform economic functions for consumers. Monopolization also affords companies the opportunity to foist less service, lower quality, and higher prices upon purchasers.[7] Figure 1 illustrates the excessive profits which monopolistic organizations can command.

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[1] 15 U.S.C. §§ 1-7 (1970). *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); J. ANDERSON, POLITICS AND THE ECONOMY 162-64 (1966); S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 761-64 (1965); Levi, *The Antitrust Laws and Monopoly,* 14 U. CHI. L. REV. 153 (1947).

[2] 15 U.S.C. § 2 (1970). *See* J. VON KALINOWSKI, 16 BUSINESS ORGANIZATIONS—ANTITRUST LAWS AND TRADE REGULATION § 7.01 [1] (1971).

[3] 156 U.S. 1 (1895).

[4] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (applying the Act to a rate-making association among western railroads).

[5] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). *See* E. REDFORD, AMERICAN GOVERNMENT AND THE ECONOMY 187-88 (1965). *See generally* W. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914). *See* p. 16 *infra* for a discussion of the "rule of reason" test.

[6] *See generally* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); F. TURNER, *The Significance of the Frontier in American History,* in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1893, at 197-227 (1894); *cf.* D. POTTER, PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND

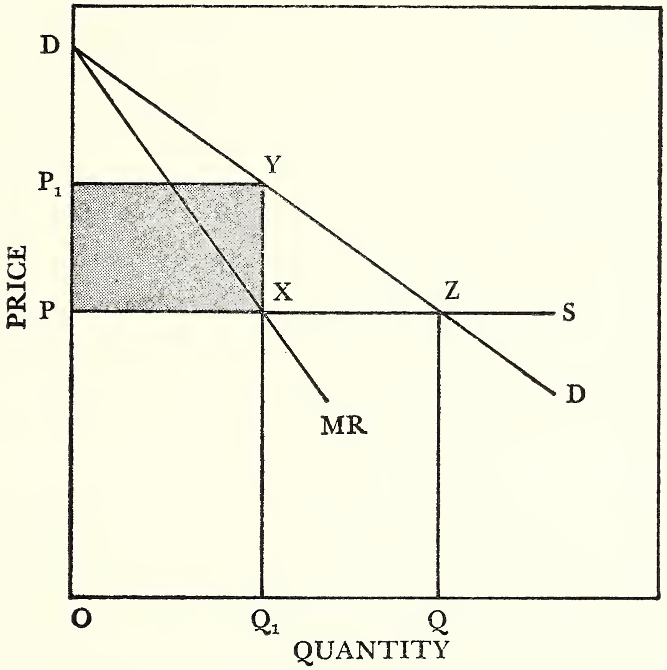

FIGURE 1

THE AMERICAN CHARACTER ch. 7 (1954). As Walter Lippmann wrote,

> While the theorists were talking about laissez faire, men were buying and selling legal titles to property, were chartering corporations, were making and enforcing contracts, were suing for damages. In these transactions, by means of which the work of society was carried on, the state was implicated at every vital point.

W. LIPPMAN, THE GOOD SOCIETY 187 (2d ed. 1943). *See also* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), the classic statement for utilitarian *laissez faire* capitalism.

[7] *See generally* Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42 (1930); United States v. Aluminum Co. of America, 148 F.2d 416, 427-28 (1945); L. REYNOLDS, ECONOMICS: A GENERAL INTRODUCTION 240-43 (1963); H. THORELLI, THE FEDERAL ANTITRUST POLICY—ORIGINATION OF AN AMERICAN TRADITION 564-68 (1955).

LONG RANGE PRODUCTION AND MONOPOLY PRICE[8]

The Sherman Act of 1890 was undoubtedly intended to disallow the excess profits illustrated by $PXYP_1$ and to avoid, as much as practicable, the other economic and social abuses which monopolization frequently creates. Natural monopolies, particularly non-territorial ones it is submitted, rarely if ever allow for such excess profits, and it is not contended that Figure 1 is applicable to such monopolies. The figure is presented simply to illustrate one abuse which the Sherman Act was designed to curb. But, as will be discussed later, natural monopolies can be expected to succumb more readily than other businesses to forced wholesale losses in sales while retaining static capital costs. This economic reality is but one reason why the United States Supreme Court decision in *Otter Tail Power Co. v. United States*[9] was illbegotten. The decision was also, and probably more importantly, a paradigm of just how far astray from orthodox antitrust and regulated utilities law a court can wander.

II. AN OVERVIEW OF THE CASE

The Otter Tail Power Company is a vertically-integrated investor-owned utility company which supplies electricity at retail to consumers in small towns and rural areas in parts of Minnesota, North Dakota, and South Dakota. Of 615 towns in the relevant geographical market,[10]

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[8] On the left margin line, OP shows a normal rate of profit on invested capital where new plant cost is constant. The long-range demand curve is DD, and the corresponding supply curve is PS. And, under competitive conditions, the industry would be expected to expand to the supply-demand intersection Z. Monopolization of the industry, however, would lead a company to sell products at OP_1, restricting, of course, production to OQ_1—the point at which marginal cost would equal marginal revenues. If the monopolist produced beyond OQ_1 it would create marginal costs in excess of marginal revenues and thus decrease profits. Hence, profits are maximized to the extent of $PXYP_1$—the excess of total revenue OQ_1YP_1) over the cost of production (OQ_1XP_1). *See* A. WARNER & V. FUCHS, CONCEPTS AND CASES IN ECONOMIC ANALYSIS 91, 101, 183-85 (1958).

[9] 410 U.S. 366 (1973), *aff'g* 331 F. Supp. 54 (D. Minn. 1971).

[10] Towns served by Northern States Power Company in the area were excluded by the district court and the Supreme Court when the "relevant geographical market" was ascertained. The dubious rationale for excluding such towns was that "the two companies do not compete in the towns served by each other." 410 U.S. 366 n.1. A proper definition of "relevant market" is essential to finding unlawful monopolization. *See, e.g.,* Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961); P. AREEDA, ANTITRUST ANALYSIS ¶ 230 (1967); C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 71-75 (1959). *See also* Barber, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U. PA. L. REV. 847, 870 (1955).

Otter Tail serves 465 or 76.5 percent. If the 105 towns served by rural cooperatives are excluded, Otter Tail could be said to control 91 percent of the relevant geographical market. The trial court found that either percentage "is sufficient to justify the inference that Otter Tail possesses monopoly power in the area."[11]

Upon finding that Otter Tail possessed monopoly power, the trial court went far beyond the scope of *United States v. Arnold, Schwinn & Co.*[12] and the test suggested in *United States v. Grinnell Corporation*[13] and found that the utility company had violated Section 2 of the Sherman Act by (1) refusing to sell wholesale power to certain municipal systems, (2) refusing to wheel power to those systems, (3) initiating and supporting litigation to delay or prevent the development of municipal power systems, and (4) relying upon provisos in its transmission contracts in order to deny municipal systems access to other suppliers.[14] Otter Tail admitted refusing to sell power at wholesale to certain municipal systems and refusing to wheel. The company suggested that its litigation against certain municipal systems was instituted without any attempt to maintain monopoly power and was, in any event, constitutionally protected. Otter Tail particularly emphasized that considerations peculiarly applicable to regulated utilities, as exemplified by the intent of Congress, were, when balanced with antitrust goals and priorities, paramount considerations which protected its conduct.

Writing for the majority, in a 4-3 decision, Justice Douglas upheld the district court on each of its crucial findings except for the one pertaining to the unlawful institution and support of litigation aimed at hampering the establishment of municipal power systems.[15] The majority found that Otter Tail had in fact controlled 91 percent of the relevant market[16] and that Section 202(b) of the Federal Power Act,[17] which provides for the compulsory interconnection of electrical transmission facilities of utilities by the Federal Power Commission, was not "intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations."[18] The Court further found that the company's refusals to sell at wholesale and to wheel "were solely to prevent municipal power systems from eroding its monopolistic position."[19] Thus, while the four-man majority analyzed the lower court decision in terms of what it thought were traditional antitrust concepts, the Court gave only cursory attention to considerations founded upon regulated utilities law. Having sprung from such a faulty analysis, it was not surprising that the Supreme Court's *Otter Tail* decision was repugnant to the clear intent of Congress and, likewise, anathematic to overwhelming free enterprise goals.

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[11] 331 F. Supp. at 59.

[12] 388 U.S. 365 (1967) holding per se unlawful vertical territorial restrictions which were imposed on distributors by a firm which no longer exercised dominion over the goods to be distributed. "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.* at 375. This was, however, a per se case involving Section 1 of the Sherman Act, although it was relied upon by the district court in *Otter Tail.* 331 F. Supp. at 64.

[13] 384 U.S. 563, 570-71 (1966), indicating that there are two elements which constitute an offense of Section 2 of the Sherman Act: (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.

[14] 410 U.S. at 368.

[15] *Id.* at 380. As to the litigation issue, the Supreme Court vacated the order of the trial court and remanded it for consideration in light of California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

California Motor Transport Co. was a Clayton Act Section 4 case in which the Court concluded that:

III. A CRITICAL ANALYSIS OF THE DECISION

A. The Misapplication of Antitrust Concepts

1. *Monopoly Power in the Relevant Market.* In *Otter Tail,* the United States Supreme Court found that the relevant market in which the utility company's dominance should be tested was the area in which it competed for the right to sell retail electricity to towns.[20] As suggested earlier, it was found that Otter Tail had monopoly power in the market because it served 91 percent of the towns within the area. The majority did not, however, take cognizance of the fact that if the com-

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> . . . it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

Id. at 510-11. *See* Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Note, *Limiting the Antitrust Immunity for Concerted Efforts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process,* 86 HARV. L. REV. 715 (1973).

[16] 410 U.S. at 370. *See* note 10 *supra* & note 43 *infra* and accompanying text.

[17] 16 U.S.C. § 824a(b) (1970). *See* p. 862 *infra.*

[18] 410 U.S. at 374-75.

[19] *Id.* at 378. The trial court had declared that Otter Tail's contract provisions, in which it agreed not to wheel, with the Bureau of Reclamation and rural cooperatives were "in reality, territorial allocation schemes." 331 F. Supp. at 63; *cf.* Pan American World Airways, Inc. v. United States, 371 U.S. 296, 308-10 (1963); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898). *See* J. VON KALINOWSKI, *supra* note 2.

[20] 410 U.S. at 370.

pany's size were measured by actual retail sales its market share would only be 28.9 percent of the electricity sold within the market area.[21]

In effect, the Court treated towns as being fungible units and completely disregarded town size. This anomalous and highly restrictive view of what constitutes monopoly power allowed the Court to conveniently ignore the fact that 440 of the 465 towns served by Otter Tail had populations of under 1,500 and that only three towns served had populations over 10,000, with the largest having a population of only about 15,000.[22] Whether or not the Court correctly identified and limited the relevant market[23] in which Otter Tail's monopoly power was to be ascertained, it certainly erred in its tacit holding that towns constituted the units of competition. To define the units of competition in precisely the same terms as the relevant market was to inject an alien and illogical concept into antitrust law.

The Government had suggested to the Court that Otter Tail's argument that its share of the market was 28.9 percent was "erroneously premised upon the inclusion in the relevant market of non-competing retail sales"[24] by Northern States Power Co., the rural cooperatives, and the Bureau of Reclamation. Overlooking for the moment the fact that the Government and the Supreme Court found these companies to be competitors for one purpose and non-competitors for another,[25] the Government's contention set forth above by-passed the true issue: Even excluding the retail sales of "non-competitors" and thereby raising Otter Tail's total percentage, the unit of competition, *i.e.*, towns, is unchanged under the Government's formulation.[26]

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[21] *See id.* at 383 n.1, where the dissent appeared to suggest that an "actual retail sales" test to ascertain dominance could be applied to the market area. *See also* United Banana Co. v. United Fruit Co., 245 F. Supp. 161 (D. Conn. 1965), *aff'd*, 362 F.2d 849 (2d Cir. 1966); Becker v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965).

[22] Brief for Appellant at 5 n.2, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) [hereinafter cited as Otter Tail Brief].

[23] *See* P. AREEDA, *supra* note 10, at ¶ 230.

[24] Brief for Appellee at 69 n.58 [hereinafter cited as Government Brief].

[25] In determining the relevant market, the companies' services were excluded; but, in finding that restrictive wheeling contracts resulted in territorial allocation schemes, the Supreme Court found that the companies were competitors. 410 U.S. at 369 n.1 & 379.

[26] In attempting to support its notion that towns, and not retail sales, were the "competitively significant" units of competition, the Government relied upon two cases. Government Brief at 66-67. As the utility company vividly pointed out, Otter Tail Reply Brief at 32, neither case gave any support to the Government's bold assertion. In the first case, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 331

2. *Refusals to Sell Wholesale and to Transmit Power.* It was undisputed in *Otter Tail* that, when a retail franchise with a town expired, the utility company would refuse to sell the town power at wholesale and would also refuse to wheel it power. Mere refusals to deal are not per se violations of the Sherman Act;[27] and, absent monopoly power, a seller may refuse to deal with anyone.[28] Moreover, the Supreme Court—until *Otter Tail*—had always permitted courts to look to the alleged economic justifications and the effects on competition when refusals to deal were attacked under antitrust laws.[29] In *Otter Tail,* however, the Court applied a per se rule of sorts by backing into its holding: the Court simply opined that the Federal Power Act did not contemplate involuntary interconnections and did not exempt Otter Tail from a duty to sell at wholesale,[30] that Otter Tail's contracts with the Bureau of Reclamation were intended to "prevent municipal power systems from eroding [Otter Tail's] monopolistic position,"[31] and, hence, that defendant utility company violated Section 2 of the Sherman Act because the refusals to deal were to maintain monopoly power.

The *Otter Tail* Court appeared to apply a unique "bottleneck monopolist" per se test.[32] By not showing directly how Otter Tail violated antitrust goals, but simply noting that the company's refusals to deal were not immunized from the application of antitrust laws, the majority impliedly rejected the "rule of reason" test. Since Otter Tail owned subtransmission lines to which it restricted access and since it refused to sell wholesale power to the same towns to which it disallowed access to the lines, in the Court's view Otter Tail ipso facto prevented the municipal systems from becoming viable competitors, and hence could be required to do those things which would allow competition to surface.

How is a company which lawfully possesses monopoly power to function without willfully maintaining it? To avoid the mechanical per se concepts, must a natural, lawful monopoly accede to all demands which

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(1963), the Court determined units of competition on the basis of bank assets, not the number of customers. Likewise, in the second case, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), the Court measured market foreclosure in terms of coal tonnage, not the number of coal sellers.

[27] *See, e.g.,* United States v. Colgate, 250 U.S. 300, 307 (1919); Daily Press, Inc. v. United Press Int'l, 412 F.2d 126, 134-35 (7th Cir.), *cert. denied,* 396 U.S. 990 (1969).

[28] *See, e.g.,* Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).

[29] *See generally* Barber, *supra* note 10.

[30] *See* 410 U.S. at 373.

[31] *Id.* at 378.

[32] *See* 331 F. Supp. at 61; A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 131-37 (1960).

would-be competitors make on its assets?[33] Neither the Government nor the Supreme Court attempted to answer the first question, and the answer to the second was an unprecedented "Yes."

In *Lorain Journal Co. v. United States*,[34] the Supreme Court condemned a newspaper monopoly which was using its power "to destroy threatened competition."[35] The newspaper had virtually a total monopoly over advertising in the market area; and, when a new radio station began broadcasting in the area, the newspaper refused to carry advertisements of merchants who advertised over the radio station. The Court found the newspaper's refusal to be violative of Section 2 of the Sherman Act and afforded injunctive relief. In *Eastman Kodak Co. v. Southern Photo Materials Co.*,[36] the Supreme Court enjoined a refusal to sell photographic supplies to a wholesaler except at retail prices. Eastman Kodak sold at both wholesale and retail and, in the Court's view, had refused to deal in order to perpetuate its monopoly.[37]

In relying upon *Lorain Journal* and *Eastman Kodak*,[38] the Court nevertheless failed to justify the injunctive relief it sustained against Otter Tail Power Company. These two cases, and others,[39] may facilitate the identification of non-natural monopolists' conduct which the Sherman Act proscribes; and the cases may suggest the appropriate affirmative relief which can be afforded. Neither *Lorain Journal* nor *Eastman Kodak* can, however, support the proposition that Otter Tail could, for its alleged violation of the Sherman Act, be compelled to wheel and sell power at wholesale. In no case has the Court, until *Otter Tail*, required a retail company to sell at wholesale to competitors or former retail purchasers. Moreover, neither *Lorain Journal* nor *Eastman Kodak* required that the companies share their capital assets rather than products or services.[40]

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[33] *See* Otter Tail Brief at 69, 81. The dissenters in *Otter Tail* would moot the first query by answering the second correctly, *viz.* Congress intended that such controversies be resolved by the Federal Power Commission, with due consideration for the monopolists' economic health and the public's need for an adequate and reliable source of electrical power. 410 U.S. at 389-93. Notes 48-58 *infra* and accompanying text discuss such an approach.

[34] 342 U.S. 143 (1951).

[35] *Id.* at 154.

[36] 273 U.S. 359 (1927).

[37] *Id.* at 368-70, 375.

[38] *See* 410 U.S. at 377.

[39] *E.g.*, Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (enjoined monopolist produce dealer from refusing to rent space to competitor where refusal was based upon lessee's potential price competition); United States v. Klearfax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945) (monopoly producer of linen rugs violated Section 2 of the Sherman Act by refusing to sell to distributor that competed for bids). *See also* Six Twenty-Nine Prod., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958).

3. *Rejection of the "Rule of Reason" Test.* As suggested above, the *Otter Tail* Court impliedly rejected the "rule of reason" test in favor of a contrived "bottleneck monopolist" per se rule when it mechanically found that the utility company had exercised unlawful monopoly power by restricting market competition through its refusals to deal. The rule of reason test requires a court to consider all of the relevant facts and circumstances pertaining to challenged conduct and then balance the procompetitive and otherwise socially beneficial effects of the conduct against the anticompetitive effects of the conduct.[41] Under a per se rule, a court makes no inquiry into the possible justifications for challenged conduct but, rather, simply condemns the proscribed activity upon a showing that it has occurred.[42]

Before *Otter Tail,* the per se rule of antitrust law was applied to such offenses as tying agreements, pricefixing, and territorial allocation schemes, *i.e.,* offenses which necessarily involved more than a mere intracompany decision.[43] It is submitted that the *Otter Tail* Court grievous-

B. The Abrogation of the Federal Power Act

While the Supreme Court majority in *Otter Tail* did a great deal of creative law writing in the antitrust field, the Court's opinion is also important for the way in which it failed to cope with regulated utilities law. Although the minority opinion stressed that considerations peculiarly aply erred in applying what was, in effect, a per se rule to the case before it. Since both the trial court and United States Supreme Court expressly

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[40] *But cf.* Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912), in which defendants were required to share capital facilities. However, in *Terminal Railroad* and *Associated Press* violations of antitrust laws were premised upon unlawful group conduct, not upon the conduct of a single company. *See also* P. AREEDA, *supra* note 10, at ¶ 388.

[41] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

[42] *See* United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. National Lead Co., 332 U.S. 319 (1947), *aff'g* 63 F. Supp. 513 (S.D.N.Y. 1945); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898). *See also* Van Cise, *The Future of Per Se in Antitrust Law,* 50 VA. L. REV. 1165 (1964).

[43] *See* Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Lowe's Inc., 371 U.S. 38 (1962); Tim Ken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

refused to consider whether forced wheeling and forced wholesale sales would be economically ruinous to the electric company, can it be said that the rule of reason test was applied?[44] Was it of no significance, in determining whether the rule of reason should apply, that Otter Tail is a regulated utility?[45]
plicable to regulated utilities, as exemplified by the intent of Congress, should control the outcome of the case, the majority simply—and erroneously—stated that Otter Tail claimed that it was "not subject to antitrust regulation"[46] and quickly found otherwise.

On behalf of the bare majority, Justice Douglas cursorily noted some relevant provisions of the Federal Power Act and its legislative history and concluded that the Federal Power Commission's "limited authority" was not "intended to be a substitute for or immunize Otter Tail from antitrust regulation" because Congress had "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."[47] One is forced to guess whether the majority realized that it had just redefined the traditional doctrine of primary jurisdiction.

In *Ricci v. Chicago Mercantile Exchange*,[48] which was decided by the United States Supreme Court less than 6 weeks before *Otter Tail*, it was held that antitrust proceedings were to be stayed until the Commodity Exchange Commission had an opportunity to decide whether certain conduct was violative of the Commodity Exchange Act.[49] In *Ricci*, a 5-4 decision, the Court noted that it was addressing a problem "seemingly within the reach of antitrust laws" which was also "at least arguably protected" by another regulatory statute.[50] The *Ricci* Court indicated that the "express will of Congress,"[51] which was stated in permissive terms in the Commodity Exchange Act, was that the Exchange Commission have an opportunity to fully consider the matter at hand before a court did so in an antitrust suit. The Court further noted that whatever determination the Exchange Commission made would be helpful to an antitrust court and, hence, upheld the stay of a Section 1 Sherman Act suit.[52]

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[44] The Court expressly found that Otter Tail's wheeling contracts with rural cooperatives and the Bureau of Reclamation were per se violations of the Sherman Act since the agreements were territorial allocation schemes. 410 U.S. at 372, *citing* United States v. Topco Associates, 405 U.S. 596 (1972), *and* Northern Pac. Ry. v. United States, 356 U.S. 1 (1968). The *Otter Tail* majority did not, of course, explain its holding that *vis-a-vis* these contracts the cooperatives and the Reclamation Bureau were potential competitors with Otter Tail but that they were non-competitors for purposes of ascertaining the relevant market in which Otter Tail exercised its dominance. *See* J. VON KALINOWSKI, *supra* note 2.

[45] *See* Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415 (1973):

> [A] per se rule is only supportable where the challenged arrangement has a pernicious effect on competition and lacks any redeeming virtue. It is appropriately invoked where experience teaches that the probability of serious competitive injury outweighs the likelihood of any social benefit.

Id. at 423 (footnotes omitted).

[46] 410 U.S. at 372.

[47] *Id.* at 374, *relying upon* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962); United States v. RCA, 358 U.S. 334 (1959).

[48] 409 U.S. 289 (1973), *aff'g* 447 F.2d 713 (7th Cir. 1971).

Section 202 (b) of the Federal Power Act[53] provide that the Federal Power Commission may direct compulsory interconnection of electrical transmission facilities if it finds that such action is "necessary or appropriate in the public interest" and if no "undue burden" will be placed on the utility company by such an interconnection. Section 202 (b) further stipulates that the FPC has no authority to order interconnection "when to do so would impair [the utility's] ability to render adequate service to its customers." The *Otter Tail* minority found that, due to the above statute, "the regulatory authority of the [FPC] with respect to interconnection is at least as substantial"[54] as the authority of the Commodity Exchange Commission in the matter at issue in *Ricci.*

Less than 2 years before *Otter Tail,* the Supreme Court in *Gainsville Utilities Department v. Florida Power Corporation*[55] held that the terms of a Section 202 (b) order "should be made in the first instance, by the [FPC, and that the] Court of Appeals erred in not deferring to the Commission's expert judgment."[56] As Otter Tail maintained in its argument to the Supreme Court, "The mere fact that an industry is regulated does not, of course, mean that it is per se immune from antitrust."[57] However,

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[49] 7 U.S.C. § 1 *et seq.* (1970); *see* Board of Trade v. Olsen, 262 U.S. 1 (1923), which upheld the regulatory provisos of the Act as being consistent with the commerce clause of the Constitution.

[50] 409 U.S. at 299-300.

[51] *Id.* at 303.

[52] *Id.* at 307-08. The Court suggested,

> The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that [there is no violation of agency rules], the antitrust court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the [regulatory agency] permits.

Id. See Sewell, *Administrative Jurisdiction and Authority,* 6 IND. L. REV. 446, 474-77 (1973).

[53] 16 U.S.C. § 824a (b) (1970).

[54] 410 U.S. at 392-93.

[55] 402 U.S. 515 (1971).

[56] *Id.* at 527.

[57] Otter Tail Brief at 43. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 351 (1963), where it was suggested that antitrust laws would not apply only "in those cases of plain repugnancy between the antitrust and regulatory provisions."

as was inferred in *Gainsville Utilities,* Congress did intend to give the FPC the first opportunity to ascertain the rights and responsibilities of power companies, with respect to the duty to wheel,[58] even if it did not intend to make the companies immune from antitrust laws.

C. Some Potential Economic Consequences

The regulated utilities, such as Otter Tail Power Company, do not make unearned excess profits[59] such as those Congress probably wished to disallow as one goal of the antitrust laws. The regulated utilities are held to a "fair return on fair value" which is usually a rate of from 6 percent to 8 percent.[60] To assure that fair prices for services are available to the public, operating costs must be kept to a minimum.[61]

Since *Otter Tail* announced that regulated utilities can be compelled to sell at wholesale prices to former retail customers, it appears virtually certain that the quantity of demand for services will increase, though the demand schedule itself may or may not shift. Moreover, the increase in quantity demand will place the utility company in the unseeming position of facing what is very nearly cross elasticity of demand at the same time, *viz.* its wholesale power will compete against its retail power. This increase in demand might not, in and of itself, be ruinous were marginal costs to remain constant.

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[58] *See* S. Rep. No. 621, 74th Cong., 1st Sess. 49, 55 (1935), *quoted at* 410 U.S. at 383-84. As the Federal Power Act was originally drafted, primarily by FPC Commissioner Seavy and Commission Solicitor DeVane, it had a "common carrier provision" which would have made it "the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . ." *Hearings on H.R.* 5423 *Before the House Comm. on Interstate Commerce,* 74th Cong., 1st Sess. 32 (1935); Otter Tail Brief at 46-57, where Senate and House committee debates are quoted at length; 410 U.S. at 386 n.4, succinctly summarizes a small portion of the legislative history; *cf.* Government Brief at 45-54, where, in effect, it was argued that the failure of Congress to provide an *express* exemption from antitrust liability implied that Congress did not intend to give primary jurisdiction to the FPC. As to the viability of such an assertion, *see* Far East Conference v. United States, 342 U.S. 570, 574 (1952); Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500, 514 (1936). The *Ricci* Court completely rejected such bold contentions with regard to similar proposed bills and the statute as passed. Notes 48-53 *supra* and accompanying text.

[59] *See* note 8 *supra* and Figure 1 in the text.

[60] L. Reynolds, *supra* note 7, at 258.

[61] *See id.* at 257-61. It must be kept in mind that regulated utilities normally enjoy greater stability of revenue and earnings than do other companies. This is, of course, largely attributabel to the fact that there is both price and income elasticity of demand for the utilities' services. E. Troxel, Economics of Public Utilities 43-44 (1947).

The potential economic ruin which Otter Tail alleged it would face by being forced to wholesale sell and wheel seems well-founded in economic principles. As the quantity of services demanded increases at the lower wholesale price, the company's marginal costs may well increase at the same time, if some municipalities demand wholesale sales while others require wheeling, since wheeling involves the sharing of a capital asset.[62]

IV. CONCLUSION

Otter Tail Power Co. v. United States[63] is unprecedented in antitrust law. In *Otter Tail* the Supreme Court found that a relevant market of competition can ipso facto define the units of competition by which a company's monopoly power is measured. The Court also set a new precedent in holding that a proper remedy to a Section 2 Sherman Act violation can be a forced sharing of capital assets and forced wholesale sales to former retail customers. As though these findings were not enough to set antitrust concepts awry, the Court also took the unprecedented step of applying a per se rule to an intra-company market decision.

Perhaps when the full Court decides another regulated utility—antitrust law case, it can undo the foolhardiness of *Otter Tail.* Until then, the holdings stand as a threat to the development of free enterprise in the field of regulated utilities; and the Sherman Act will hold a sword which, it now appears, has no adequate sheath.

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[62] *See* L. REYNOLDS, *supra* note 7, at 123, 125, 135, 261-62; A. WARNER & V. FUCHS, *supra* note 8, at 41-44, 128-32, 158-60, 169-72, 196-201.

[63] 410 U.S. 366 (1973).

LEGAL PROBLEMS IN ORGAN TRANSPLANTS

*Jerome F. Leavell**

INTRODUCTION

> We can either preserve the ancient laws that guarantee the inviolability of the dead and the present rights of the next of kin, or we can rewrite those laws in favor of the living. Neither course is politically easy; but we have no third choice. If we want to preserve our present law, we must also accept poor but costly substitutes for natural spare parts. Many may feel that this comes within a hairsbreadth of saying that the rights of the dead take precedence over the rights of the living; they may feel that such an argument is already as outmoded as the arguments of the early anti-anatomists. If enough people come to feel this way, the laws will be changed.[1]

The foregoing comment was made only months prior to the introduction of the Uniform Anatomical Gifts Act by the National Conference of Commissioners on Uniform State Laws[2] during August, 1968.[3] The Uniform Act was drafted by Professor E. Blythe Stason of Michigan Law School, and further developed during 3 years of study. With the endorsement of both the American Bar Association[4] and the American Medical Association, it has now been adopted by all but three states, as well as the District of Columbia.[5]

Although Mississippi has not adopted the Uniform Act, its statute, enacted in 1970,[6] is quite similar to the Uniform Act, and will therefore be applicable to the following discussion.

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[1] LONGMORE, SPARE-PART SURGERY 179 (1968).

[2] The National Conference of Commissioners on Uniform State Laws is composed of three lawyers or judges from each state, chosen by their Governor for 3-year terms. Their function is to make state laws more uniform and relevant. At their annual meeting they review proposed drafts of model or uniform acts prepared by their subcommittees. The subcommittee which developed the U.A.G.A. [also cited as the Uniform Act] was composed of E. Blythe Stason (Michigan); David R. Bishop (Michigan); Hugh N. Clayton (Mississippi); Douglas Keedie (Arizona), and Richard Rabbit (Missouri).

[3] Arkansas Democrat, Jan. 1, 1969, at 3A.

[4] The U.A.G.A. was endorsed by the Amercan Bar Association on August 7, 1968.

[5] Council of State Governments, BOOK OF THE STATES 1970-71 (1970).

[6] MISS. CODE ANN. §§ 278.3-01 to -09 (Supp. 1970).

This article primarily concerns the problems of "consent" and "liability" in relation to the Uniform Act and the similar Mississippi statute. Hopefully it will provide insight into a virtually unknown, but increasingly important, area.

The fundamental principle permeating the Uniform Act is that a person should be able to control the disposition of his own body, or any part of it, upon death, without geographical limitation. Furthermore, the Uniform Act is the first attempt to standardize criteria relative to this problem and to protect doctors who wish to procure and use human tissues.

Section 2 of the Uniform Act allows persons who are 18 years of age or older and of sound mind to execute an anatomical gift. The age limitation reflects a growing tendency to place adult responsibility at a younger age and considerably enlarges the potential number of primary donors. Additionally, under section 2, the survivors may make the gift immediately before death or thereafter. These survivors are classed in a hierarchy which provides levels of donative authority. The specific hierarchy of survivors authorized to make the gift, when those of a previous class are unobtainable, will materially reduce the loss of critical time. The physician will thus be reassured that the person making the post-mortem gift has been authorized to do so. The rights of the donee are made supreme to all others except for the state's right of autopsy. This supremacy provision reasonably insures the physician donee that the gift cannot be countermanded by the survivors of the donor.[7] Mississippi's donative authority is found in section 278.3-01 of the Mississippi Code and its provisions are similar to the Uniform Act, except that the donative age is 21 years. In addition, the Mississippi statute does not insure that survivors cannot revoke the gift, although it does stipulate that the survivors cannot make a donation in violation of the decedent's instructions or known wishes to the contrary.

Section 7 of the Uniform Act clearly outlines the privileges and obligations of all parties upon the death of the donor. The donee may reject or accept the gift, and provisions are made to include the interests of the survivors in providing the body for memorial services, where not precluded by the terms of the gift. When only a part is donated, the donee is obligated to remove it without unnecessary mutilation and give custody of the remains to next of kin for burial. Also under section 7, several other important rights are delineated, especially in the area of the physician's liability. The donee acquires absolute ownership of the body or part specified in the gift, and is free from legal liability unless he acts without good faith, mutilates the body, or exceeds the terms of the gift.

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[7] As a practical matter however, a survivor might still defeat an organ gift by advising the transplant physician that the authorization has been revoked by the donor in a then unavailable document or by an unrecorded statement. *See* Randall & Randall, *The Developing Field of Human Organ Transplantation,* 5 GONZAGA L. REV. 20 (1969).

Another important provision, which is provided in section 4, is that the physician in attendance at death who certifies the death may not participate in removal or transplantation. An obvious conflict of interest would result otherwise.[8] Additionally, the determination of death is left to medical authorities. Artificial legal standards cannot easily be applied to a problem about which there is significant medical difference of opinion. The physician will doubtlessly judge death by the equipment and current standards at his command, without concerning himself with whether he is satisfying a static statutory definition. One who acts in good faith, pursuant to the terms of the Uniform Act, is relieved of liability, either civil or criminal, for such acts.

The Mississippi statute[9] contains similar provisions, and, in addition, relieves the liability of those who act in "good faith" and without "notice of revocation." Furthermore, a person who "unknowingly fails to carry out the wishes of the donor" is protected.[10] The Mississippi statute provides protection only in civil cases, however; it does not mention criminal actions. Mississippi has further settled certain conflicts of law problems by recognizing gifts executed in other jurisdictions.[11]

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[8] *See* Couch, Curran, & Moore, *The Use of Cadaver Tissues in Transplantation,* 271 New England J. Med. 681 (1964).

[9] Section 278.3-06 of the Mississippi Code provides:

> (a) The donee may accept or reject the gift. When the gift is only part of the body, promptly following removal of the part named, custody of the remaining parts of the body shall be transferred to the next of kin or other person or agency authorized or under obligation to dispose of the body. The time of death shall be determined by the physician in attendance upon the donor's terminal illness or certifying his death, and said physician shall not be a member of the team of physicians which transplants the part to another individual.
>
> (b) A person who, in good faith and acting in reliance upon and authorization made under provisions of this act and without notice of revocation thereof, takes possession of, performs surgical operations upon, or removes tissue, substances or parts from the human body; or refuses such a gift; or any person who knowingly fails to carry out the wishes of the donor according to the provisions of this act, shall not be liable for damages in a civil action brought against him for such act.

Miss. Code Ann. § 278.3-06 (a) & (b) (Supp. 1970).

[10] Miss. Code Ann. § 278.3-06 (b) (Supp. 1970).

[11] Miss. Code Ann. § 278.3-04 (e) (Supp. 1972).

Although there are other provisions in both the Uniform Act and the Mississippi statute, they are not pertinent to the remaining discussion.

THE PROBLEM OF CONSENT

A. Consent of the Donor

As the skills of transplant teams increase and the rejection problem is gradually eliminated, more organs should become available for tran plantation. The early transplants of vital organs were usually paired kidneys from living donors. Kidneys were transplanted because the living donor had two kidneys, but could function satisfactorily with one. Since the rejection factors were high, donors were generally limited to members of the family, where tissues were more easily and productively matched. Because these negative factors are now being reduced, more organs are naturally coming from cadaver donors, with, of course, the additional ethical advantage of their having no need of these replacement parts. Consequently, the problems peculiar to living donors are also becoming proportionately less significant. Nevertheless, since it is in keeping with traditional societal and legal concepts of the sacredness of the individual, and since the Uniform Act and the other gift statutes do not deal with living donors, the issue of adequacy of consent must continue to occupy a position of priority until the problem has been completely resolved by medical progress.

The physician must obtain consent from both the donor and the recipient for such surgical procedures.[12] The physician's concern is whether the consent is of sufficient validity to protect him from civil and criminal liability. As a starting premise it seems to be accepted that if the procedure consented to has a recognized and accepted "therapeutic" purpose, no liability per se should attach to the physician's invasion of the patient's person in an attempt to achieve that end. Since organ transplants are now usually within this definition, ordinarily the medical personnel performing the operation will be protected, provided the consent obtained is "informed" and "voluntary" and the consenting party is legally competent.[13]

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[12] A suggestion on donor forms is provided by Wasmuth & Stewart, *Medical and Legal Aspects of Human Organ Transplantation,* 14 CLEV.—MAR. L. REV. 442 (1965). Consent evidently makes lawful all minor therapeutic procedures of a cosmetic nature, such as removal of skin blemishes, teeth straightening, tatooing, and perforation of ear lobes. Myers, Aspects of Private and Public Law Regarding the Human Body from the Medico-Legal Standpoint 242, 1968 (unpublished dissertation in University of Edinburgh Library), *citing* Strauss, *Bodily Injury and the Defense of Consent,* 81 S.A.L.J. 344 (1964). The removal of naturally replaceable or repairable tissues, such as blood transfusions and skin grafts, also does not create any particular problem where consent is obtained. *Id.* at 242, *citing* Forbes, *Legal Aspects of Blood Transfusion and of Therapy in General,* 4 MED. SCI. L. 26 (1964).

In discussing the aspects of informed consent, the California Court of Appeals in *Salgo v. Leland Stanford, Jr.*,[14] declared:

> A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise, the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent. At the same time, the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who as a result refuses to undertake surgery in which there is in fact a minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to informed consent.

When the recipient of a vital organ transplant is to receive a functioning organ, he will surely die after his own diseased organ is removed, unless, as in the case of a kidney, he can be sustained by a machine until another donor can be found. The preparations for such risk-ridden procedures are thus made in an artificial environment charged with emotion and tension.[15] Therefore, the recipient's (or his proxy's) consent requires an even greater degree of understanding to be intelligently given. This is a matter of subjectivity and perforce must vary somewhat with the facts and circumstances of each case. While the statement that informed consent is a prerequisite to such a radical surgical procedure does not admit of argument, it is difficult, if not impossible, to define the limits of the information required for such consents. It is clearly necessary to admit the limitations of the mechanism of informed consent,[16] but it is equally unavailing and counter-productive to attempt to go beyond it for a preferable, workable alternative. Conceding this, the best test for validity of consent appears to be the customary and flexible "reasonable man" standard. Was the patient (or his proxy) informed of all of the material facts that a "reasonable man" would have wanted to know before making an intelligent choice? Was the individual given full opportunity to exercise his own independent judgment as to whether or not to participate?[17] If so, then no liability should ensue with respect to the organ recipient.

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[13] "There is some question, however, whether the donor is acting free of coercive forces. The donor is subjected to extreme psychological and emotional pressure; inherent in his opportunity to save the life of a friend or relative, but despite the existence of such moral pressures practice has established the fact that fully informed adults are sufficiently free of coercion to give valid consent." Beecher, *Some Fallacies and Errors in the Application of the Principle of Consent in Human Experimentation,* 3 CLIN. PHAR. & THER. 141 (1962).

[14] 154 Cal. App. 2d 560, 317 P.2d 170, 181 (1957).

[15] *Medical Experiment Insurance,* 70 COLUM. L. REV. 965, 977 (1970).

With respect to the donor, the considerations, while analogous in part, are somewhat different because of the inducement factors. The consent does not involve the same factors as would a normal "self-therapeutic" operative procedure. Most importantly, it may be difficult to show that the operation provides any benefit to the donor.[18] The high probability of satisfactory existence with one kidney presumably explains why legal liability has not been imposed for such organ removals.[19] The typical response, especially in the case of the "family" donor, is that the risk to him is relatively slight compared to the certain death and loss of a loved one; therefore, the obvious consideration and benefit to the donor is years of love and affection from the recipient if the operation is successful.

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[16] Myers, *supra* note 12, at 345.

[17] "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Schloendorff v. Society of N.Y. Hosp., 221 N.Y. 125, 105 N.E. 92, 93 (1919).

[18] One major difficulty should be considered. In the human body there are two kidneys. If one is injured the second carries on the entire metabolite function of both kidneys with no resultant harm to the individual. However, if a donor, who is left with only one kidney, subsequently suffers damage to his remaining kidney, he is in the same position as the recipient of his kidney and is a candidate for transplant himself. Thus, there is a definite danger in giving a kidney and the donor must be so advised.

Woodside, *Organ Transplantation: The Doctor's Dilemma and the Lawyer's Responsibility,* 31 OHIO ST. L.J. 66, 73 (1970).

[19] Nevertheless, it is a substantial sacrifice, particularly for patients donating a kidney to one of many children. A mother has obligations not only to the child with renal failure, but to her other healthy children. Although one kidney will sustain life normally and indefinitely, there is the risk that disease or injury will affect the remaining organ. The ethical questions involved in asking a minor to give a kidney to a brother or cousin have become so complex that it is no longer practiced in most centers.

Dunphy, *The Story of Organ Transplantation,* 21 HAST. L.J. 67, 71 (1969).

Though these paired organ removals cannot be performed without some risk,[20] at least to the extent the donor is subjected to the rigors of a severe surgical trauma and elimination of his reserve,[21] few legal disputes have actually arisen regarding liability to the donor. Some illumination was provided in this area not long ago in three landmark Massachusetts Declaratory Judgment actions—(1) *Masden v. Harrison,*[22] (2) *Husky v. Harrison,*[23] and (3) *Foster v. Harrison.*[24] All three cases concerned the consent of a minor to donate a kidney for his identical twin who suffered from fatal renal disease. In each case a hospital sought the court declarations prior to proceeding with kidney substitution. The three cases involved donations where consent was given by both the children (teenage youths of ages 19, 14, and 14) and their parents (or guardians). The issue was the competence or capacity of the consenting parties.[25] Were these consents of such legal efficacy as to protect the hospital and surgeons from liability for civil and criminal assault and battery?

The court declared that the hospital would incur no liability if the operation was required to save the sick twin and if the healthy twin (donor) knew all of the consequences before consenting. Based on the testimony of a psychiatrist that if the sick twin should die the resulting emotional disturbance ("grave emotional impact") could affect the health and well-being of the donor twin for life, the court concluded that the operation was for the benefit, if only psychological, of the donor.[26] Thus, the operation was for the continued good health and well-being of the healthy twin.[27] Apparently, the only other American case in point is *Bonner v. Moran*.[28] There the physician removed some skin for a graft from a boy, aged 15, for the benefit of a badly burned cousin. The donor was taken to the physician by an aunt and there gave his consent. His mother was never told of the operation. Later the boy became ill and suffered a permanent scar. The federal appeals court found that a surgical operation was a technical battery, and as such was excusable only by the consent of the parents. In such a situation a doctor is justified in operating on a minor, with only the minor's consent when he is near maturity. Moreover, since this operation was not for the donor's benefit it was necessary to have his parent's consent. The court stated that this was "a case of a surgical operation not for the benefit of the person operated on but for another, and also so involved in its technique as to require a mature mind to understand precisely what the donor was offering to give. . . ."[29] That the donor had acted idealistically in the hope of helping his ailing cousin was evidently regarded by the court as irrelevant. This case might also be taken as a precedent for the proposition that competent consent may be given for removal of tissue, even if the operation is not for the donor's direct physical benefit. Albeit, the limits to this "intangible" benefit remain undetermined and doubtful. For instance, would the consent of a friend of the recipient, rather than a twin, who volunteers his kidney, be valid against a post-operative repudiation on the basis of the "benefit" principle? This question of what constitutes benefit to a donor stands in need of considerable clarity.

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[20] A most important aspect of the use of a living donor is the risk to such donor upon the removal of one of his two normal kidneys. The risk can be described in two components: one, the immediate risk of operation; and two, the long-range risk of living with one healthy kidney rather than with two. Both of these risks are small and hard to assess precisely; however, the following statements can be made. To date, over 650 such operations have been performed with no known fatalities or permanent disabilities. The immediate risk of such ill effects therefore is low, but it is doubtful that the figure will remain at zero forever. Stickel, *Organ Transplantation in Medical and Legal Perspectives,* MEDICAL PROGRESS AND THE LAW 40 (1970).

[21] Woodside, *supra* note 18, at 74.

[22] No. 68651 (Mass. Sup. Jud. Ct., June 12, 1957).

[23] No. 68666 (Mass. Sup. Jud. Ct., Sept. 14, 1957).

[24] No. 68674 (Mass. Sup. Jud. Ct., Nov. 20, 1957).

[25] The problem becomes more complex when one deals with donations of a kidney from a minor since the minor, of course, is incapable of consent. The parent can consent to the operation on a minor, even though it would certainly not be for the benefit of the donor child; but because of the potential liability involved in such an operation, most surgeons refuse to take an organ from a minor without a court order.

Richards, *Medical-Legal Problems of Organ Transplantation,* 21 HAST. L.J. 77, 84 (1969).

The question of capacity of children, *qua* children, to consent to transplantation is a controversial one.[30] For example, Professor Paul A. Freund of Harvard thinks that a child is ordinarily legally incapable of consenting to tissue removal, when the removal is of no direct benefit to him,[31] but is against an absolute disqualification which would eliminate much useful investigation.[32] Oxford University's Professor Daube takes an even more stringent view, contending that children should never be transplant donors.[33] This view is in keeping with the traditional English attitude toward hazardous experiments involving children, which are not directly beneficial to such children. According to the English view it is impermissible to conduct such procedures even with parental consent.[34] English courts do not regard a child of less than 12 years of age as being capable to consent to any medical procedure which may do him harm. In Scotland it is age 14, and in America evidently 18 is the minimum age for a person to be capable of giving valid consent.[35] According to one source it is the practice of American doctors to refuse to perform any operation on children under age 10, even for their direct benefit, without parental consent. While it is the apparent consensus that any person who is age 18 or older possesses the full capacity for requisite consent in any recognized operation,[36] in America persons under age 21 are not usually considered as kidney donors because the validity of their consent in this context is subject to question, except in identical twin cases.[37] Other groups placed in "special consent" categories, because of their extraordinary vulnerability to undue influence, are: the feebleminded, the insane, soldiers, wards, medical students, and prisoners.[38] Of course, there is the even deeper problem of the uncomprehending or illusory consent. Suffice it to say that the ethical and legal issues which underlie the question of consent in such cases are of considerable complexity.

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[26] This reasoning has not escaped criticism. For example: "Yet the whole opinion of the Court is based on this one opinion which leaves the door open for almost all donors to donate since any child of normal intelligence would suffer grave and emotional impact if his mother, father, brother, or sister died and a donation of one his organs would have saved this relative's life. And since a child would generally be a good donor for such a relative (because of the genetic similarity) there would seem to be no limitation upon this doctrine." Woodside, *supra* note 18, at 78.

[27] This reasoning is difficult to reconcile with the decision in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969), an often criticized case where the donor twin was retarded.

[28] 126 F.2d 121 (D.C. Cir. 1941).

[29] *Id.* at 123.

[30] *See* Curran, *A Problem of Consent: Kidney Transplantation in Minors,* 34 N.Y.U.L. REV. 891 (1959); *Experimentation on Human Beings,* 20 STAN. L. REV. 99, 107 (1967).

Thus, the legal effect of consent by a living donor to removal of tissues, which are not necessarily replaceable by his own body, still remains relatively uncertain. Moreover, the whole question of the "extent" of consent—what one willing individual can donate to another for purposes of health or medicinal improvement—remains doubtful and in need of full consideration by the courts. The uncertainty is further complicated by the traditional social-legal attitude of hostility toward surgery not carried out for the physical benefit of the patient, consent notwithstanding.

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[31] Freund, *Ethical Problems in Human Experimentation,* 227 New Eng. J. Med. 687, 691 (1965).

[32] Freund, *Introduction,* Daedalus xii (Spring, 1969).

[33] Myers, *supra* note 12, at 247.

[34] *Id.*

[35] Beecher, *Scarce Resources and Medical Advancement,* 98 Daedalus 275 (1969).

[36] Myers, *supra* note 12, at 249.

[37] Stickel, *supra* note 20, at 44.

[38] For a comprehensive discussion of the subject of prisoners as donors and the problem of consent, see Woodside, *supra* note 18, at 80-87; Stickel, *supra* note 20, at 33-34.

B. Consent of the Recipient

With respect to consent by the recipient, the considerations are somewhat different. In Anglo-American law there is a premise that "each man is considered to be master of his own body."[39] Consequently, any physical invasion must rest on a free and informed consent. Such consent protects the physician from a claim of assault and battery.[40] By the same token, an affirmative misrepresentation by the physician as to the nature of the operation or a failure to disclose the probable consequences of the operation expose him to a charge of unauthorized treatment. The physician, however, has no obligation to describe in detail all of the possible consequences of treatment, if the patient should have known of the danger by the nature of the operation. The absence of informed consent subjects the physician to a claim of assault and battery, to medical malpractice for lack of conformity to medical standards,[41] or sometimes even to a claim for wrongful death.

What should be the ingredients of informed consent in heart transplants? As pointed out in the excellent and thorough analysis of this problem by Jeffrey C. Baker in *Liability and the Heart Transplant*,[42] if the doctor portrays the transplant as a means of probable recovery, the consent is unlikely to be construed as an informed one. Although some hope for prolongation of life is offered by the survival of several transplant patients, the radical nature of this extreme operation requires that the patient fully comprehend that his life will be endangered by the transplant, and that even if he survives, his life span will probably be limited. Few patients, if any, however, would refuse the possibility of a prolonged life. In other words, it is a matter of semantics and verbal emphasis. This is where a very subtle element enters the picture and where the greatest danger lies in this doctor-patient relationship. If consent is couched in such terms by the doctor as to make it appear to be a choice of "treatment" or "no treatment," it is actually no consent at all, but a mere affirmation of the doctor's decision.[43] Moreover, if put in terms of "death or life," it is not a valid consent, since this is a misrepresentation of the true situation. The decision is not one of "death or life," but of "probable death or probable limited prolongation of life." It is also extremely important in this respect that the standards of such consent be even more scrupulously enforced now that transplants of vital organs have been apparently removed officially from the category of experimentation by the Uniform Act; thus, possibly encouraging less skillful physicians to attempt the operation. The courts should be absolutely certain that proper criteria are established for informing the patient of the medical expectations and conceivably dire consequences of his decision, and that unscrupulous medical practitioners are held accountable for failure to conform thereto.[44]

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[39] Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Schloendorff v. Society of N.Y. Hosp. 211 N.Y. 125, 105 N.E. 92 (1914). *See also* Annot., 99 A.L.R.2d 599 (1965).

[40] Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); Baker, *Liability and the Heart Transplant*, 6 HOUS. L. REV. 85 (1968).

[41] Baker, *supra* note 40, at 105.

[42] Baker, *supra* note 40, at 106.

LIABILITY OF TRANSPLANT PHYSICIANS

The field of heart transplantation is so new that the medical community, *inter alia,* is somewhat unsure of what constitutes acceptable procedures, techniques, and limitations.[45] We have seen that the Mississippi statute[46] and the Uniform Act, which authorize organ and tissue gifts after death, limit the liability of persons acting under the authority of a written instrument of gift.[47] But what of the physician who lacks or exceeds such authorization? While the Uniform Act does not define the donee's liability for failure to act in "good faith," it would seem that he would be accountable in damages for accepting a gift with knowledge of its revocation; for knowingly exceeding the terms of the donation; or in a single-organ situation, for failure to return the body to the survivors in a condition suitable for burial.[48] Living donors, such as donors of paired organs (kidney), however, are not subject to the Uniform Act, and the law concerning them is extremely limited. There are no reported appellate cases on unauthorized organ removal from a living donor for transplant purposes, or exceeding the authority when consent for such a gift was actually made.[49] Most problems in this area revolve around the the question of consent. For example in *Bonner v. Moran*,[50] a physician was held liable in trespass for a skin graft taken from a 15-year-old boy, despite the donor's consent.

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[43] In attaching significance to the principle of personal autonomy the author is cognizant of the degree to which the power of decision of the very ill person in an experimental setting is greatly diminished. An investigator cannot create a strong ego for a patient or subject, but there are leads he can follow to stimulate what he does find in the person. A sensitive investigator can enhance the consent situation for the normal subject or patient by assisting him to perceive what it is that he does have control over; that is, his consent. Some physicians when interviewed revealed confusion about the content of patients' consent. Some indicated that they thought informed consent meant that the patient is expected to agree intelligently to the design of the experiment or to the details of a new therapy, and thus they could easily despair of ever attaining consent or be wary of seeming to relinquish professional medical judgment. The expectation of informed consent has never been that the patient be a judge of the medical procedure in the consent situation. What is hoped for is the most self-possessed decision to give consent, to say "yes" or "no" to participation. The roots of the word consent (*con-sentio*) point not only to mutual understanding between the parties but to an answer which proceeds from within the person, involving feeling and perception. The most serious moral question which can be addressed to those who participate in the consent situation is this: How can the subject be helped to employ what power of decision he does possess? Can the interaction be turned to the mutuality of the persons involved so that fears of manipulation and deception can transmute into meaningful cooperation between equals in the research procedure? Such prominent questions are derived from the principle of persons-in-mutuality, so integrally related in its development to the personalizing meaning of agape; the central focus on Christian ethics. The two values which could come into conflict in the consent situation, the general welfare and the welfare of the individual, must be balanced and harmonized in the consent situation itself. It is not by accident that nonscientists have become concerned and involved in the debate about consent. Stickel, *supra* note 20, at 87.

[44] *Id. See also* Salgo v. Leland Stanford Jr. Univ. Bd. of Trust., 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

Doubtless, a physician who removes an organ (such as a kidney) from a living donor without proper authorization or requisite care and skill would be liable in tort for damages as in the case of any unauthorized (assault and battery) or negligently performed (malpractice) operation.[51]

As a convenient vehicle to explore possible civil liability of the transplant physician in cases of post-mortem organ donation, Jeffrey Baker has suggested the following hypothetical:

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[45] Since the conventional definition of death has been the only legally recognized definition to date, the legality of unconventional determinations of death, so-called because based on an unconventional definition of death, and also of transplant surgery dependent on these determinations, is uncertain. Luyties, *Suggested Revisions to Clarify Section 7 of the U.A.G.A. on Determinations of Death*, 11 ARIZ. L. REV. 749 (1969).

[46] MISS. CODE ANN. § 278.3-06(b) (Supp. 1972).

[47] U.A.G.A. § 7.

[48] U.A.G.A. § 7(a).

[49] Luyties, *supra* note 45, at 749.

[50] 126 F.2d 121 (D.C. Cir. 1941).

[51] For an exculpatory statute which pre-existed the U.A.G.A., see TEX. REV. CIV. STAT. art. 4590-1 (1960), repealed by Act of May 29, 1969, Tex. Laws ch. 375, § 9: "the hospital or physician shall not be civilly or criminally liable for removing said organs or any part thereof from the body, providing the donor has, prior to death, executed a valid written agreement as provided herein." *See also* Wall v. Brim, 138 F.2d (5th Cir. 1943) (an operation performed without patient's consent is a technical battery).

> D is injured in an automobile collision and is brought unconscious to a modern hospital. A surgeon, S, examines D and concludes that he has suffered a fractured skull, and that his brain is hemorrhaging badly. S determines that there is no hope of saving D's life and later death is pronounced. Since D's internal organs are still intact, S immediately connects him to an artificial respirator to keep his tissues viable. Recipient, R, has been bedridden in the hospital for some time with a deteriorating heart condition. After some tests, S decides that D is a suitable donor and obtains R's consent to perform the transplant. D's wife consents and the transplant is performed. Artificial equipment is removed from D's body and R is returned to the recovery room.[52]

This hypothetical raises several possible legal issues: (1) When is D legally dead so that S can remove his organs without incurring malpractice liability for causing that death?[53] (2) In what area may S encounter malpractice to R, the recipient? (3) Are heart transplants malpractice per se on the ground that they are experimental and violative of public policy?[54]

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[52] Baker, *supra* note 40, at 107.

[53] This question is often a subject of much "semantical variation," which further complicates the basic issue. Examples: (1) "Doctors are faced with a dilemma as to should a person be kept *alive* artifically or allowed to *die* naturally." (2) "The religious and moral question involved is whether or not a doctor should *speed up* a donor's death when death is imminent. . . ." Opposing this point of view, Rabbi Emanuel Jakobovits, Chief Rabbi of the British Commonwealth states: "Even a fraction of life is precious. Therefore no one must hasten the death of a donor." (3) "At a recent scientific meeting in London, Professor Michael Woodruff who performed Britain's first kidney transplant operation, stated that 'doctors must remove organs from a donor before he dies if transplant operations are to succeed.'" (Note that all of these statements turn on the definition of the term "death.") Such definitional variation is enough to give a philologist a verbal nightmare. Greenstone, *Legal Aspects of Organ Transplants,* 92 N.J.L.J. 449, 454 (1969).

> While the electroencephalograph might well be used in all cases in order to determine cerebral death, it is of particular interest to those patients who have had catastrophic neurologic difficulty and who require, in order to preserve life, ventilation by mechanical means. To continue life in such patients condemned to eternal state of coma is merely a triumph of protoplasmic resuscitation. It is doubtful whether there is any benefit to the patient, and certainly there is a financial drain on the family.

Wasmuth, *Organ Transplantation,* LEGAL MEDICINE NEWS (1969). See Fletcher, *The Patient's Right to Die,* 221 Harpers, OCT., 1960, at 139; Stevens, *What is Death,* 94 READERS DIGEST 225 (May, 1969); 205 J.A.M.A. 29 (1968); Collins, *Limits of Responsibility in Prolonging Life,* 206 J.A.M.A. 391 (1968).

[54] *See* E. DAVIES, TRANSPLANT—THERAPY OR EXPERIMENT. "There should be legislation to make it clear that a transplant operation would not per se give rise to civil or criminal liability. The surgeon would then have some protection but would still be under a duty of care not to endanger the donor's health," (or the recipient's?).

As to the first question, the responsibility of interpreting the physiological conditions constituting death are left, under the Uniform Act, to the discretion and judgment of the attending physician (section 7 (b)),[55] who, by section 7 (c),[56] is apparently absolved from responsibility when acting in good faith. Section 278.3-06 of the Mississippi statute has similar provisions. Nevertheless, it is conceivable that a court might interpret these exculpatory provisions narrowly,[57] in which event the physician's determination of death might be circumscribed by various possibilities of civil and criminal liability.[58]

One authority, in concluding that Section 7 of the Uniform Act does not necessarily afford protection to the physician, stated: "The first step in deciding whether such a physician is somehow protected by the U.A.G.A.'s disclaimer is to determine whether he acts 'in accord with' section 7 (b) (directing that 'the time of death shall be determined by a physician who tends the donor. . .'), when he makes a determination of death. The second step is to determine whether a negligent act can be committed in good faith."[59] If both questions can be answered affirmatively, the determiner of death should be immune from liability, provided, of course, that the determination is alleged to be only negligent—not intentionally wrongful.

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[55] U.A.G.A. § 7 (b): "The time of death shall be determined by a physician who tends the donor at his death, or, if none, the physician who certifies the death. The physician shall not participate in the procedures for removing or transplanting a part."

[56] *Id.* § 7 (c): "A person who acts in good faith in accord with the terms of this Act or with the anatomical gift laws of another state (or a foreign country) is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act."

[57] "Not all courts can necessarily be expected to conclude that doctors are authorized to make unconventional determinations of death in conjunction with U.A.G.A.—authorized body gifts even if confronted with the intention of the drafters to negative the older, anachronistic definitions of death and to leave the definition of death to the medical profession." Luyties, *supra* note 45, at 761.

[58] There is an apparent disagreement concerning the U.A.G.A.'s "exculpatory clause." Some authors contend that the clause is far more extensive than it appears. They opine that:

> The possible criminal or civil responsibility of the physician who makes the determination to discontinue medical treatment in maintaining circulation is apparently governed by the Anatomical Act. A person acting in good faith in accordance with the terms of the Act is not liable in damages or criminal prosecution. Moreover, a respected legal scholar (Fletcher) has suggested that the discontinuation of treatment is an omission, rather than an affirmative act, which places the question in the context of what 'doctors customarily do.'

Randall & Randall, *supra* note 7, at 37.

[59] Luyties, *supra* note 45, at 749.

To the extent that the attending physician determines death for the purpose of designating when organ removal from a corpse can commence, the physician is acting in accord with the Uniform Act. Consequently, assuming good faith compliance with the terms of the anatomical gift, the doctor should be protected from any claims of mental distress caused by the mishandling of the dead body. However, the doctor in the transplant setting not only determines death of a donor *qua* corpse; he also determines the death *qua* patient. Thus, if a question arises as to time of death, the fact that an attending doctor made the determination that death had occurred before organ removal or withdrawal of supportive therapy would not necessarily justify application of the disclaimer to immunize the doctor from liability for a negligent determination made when the donor was still alive.[60] The disclaimer applies only to the acts of the attending doctor in his relationship to the donor *qua* corpse so that a malpractice claim based on the use of improper criteria to determine death or misapplication of proper criteria may still be heard.[61] Indeed, the disclaimer probably does not apply to the acts of the attending doctor with regard to the donor *qua* patient, but the meaning of the disclaimer is difficult to extract from the terms of the Uniform Act. From the discussions of the Uniform Act in the Committee of the Whole of the National Conference of Commissioners on Uniform State Laws in August, 1967, and July, 1968, where the disclaimer was analyzed the following conclusions (as to the intended meaning of the disclaimer) can be drawn. First, good faith was intended to protect the donee or any doctor who accepted and used an anatomical gift, ostensibly made in accord with the Uniform Act without actual notice of a latent procedural defect in the gift document. Second, protection is also afforded to the donee who accepts an anatomical gift from a survivor of the decedent without knowledge that the survivor knows of the objections to the gift by other survivors or by the decedent. Third, if the gift is accepted after it has been revoked but before actual notice of the revocation is received, the recipient and others acting on the gift are immune from liability.

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[60] *See generally* Corday, *The Patient's Rights Always Come First,* PROCEEDINGS OF THE NATIONAL MEDICOLEGAL SYMPOSIUM (1969); Halley & Harvey, *Definitions of Death,* 69 J. KAN. MED. SOC'Y 280 (1968); Hamlin, *Life and Death by EEG,* J.A.M.A. 112 (1964); Sadler, *Transplantation—A Case for Consent,* 280 NEW ENG. J. MED. 862 (1969); Wecht & Aranson, *Medical-Legal Ramifications of Human Tissue Transplantation,* 18 DEPAUL L.J. 588 (1969); Williams, *Transplantations—Other Tissues and Organs,* 65 NURSING TIMES 818 (1969); Williams, *Transplantation Problems,* 65 NURSING TIMES 849 (1969). *See also Hearings on S.B.* 2999 *Before the Senate Committee on the District of Columbia,* 91st Congress, 2d Sess. 1730 (1970).

[61] This is the crux of the problem:

> On the other hand, courts which have paid lip service in the past to the idea that the time of death is a question of medical judgment have apparently meant only that the time at which all vital functions ceased (the traditional legal definition) was a question of fact. That is, the question of the existence of death was resolved within the context of traditional legal criteria, . . . Therefore, in a pre-U.A.G.A. claim arising out of a doctor's withdrawal of supportive therapy or a surgeon's removal of an organ before conventional death, a court could have instructed a jury to determine, in terms of the existing definition of death, whether the signs which were observed by the doctor constituted conventional death. The question is then the import of the first sentence of section 7 (b).

Luyties, *supra* note 45, at 755. In other words, does this give the determining physician the freedom to use any *criteria* that the medical profession will accept?

Another factor which militates against construing the disclaimer to immunize negligent determination of death from liability is that it would probably be held unconstitutional. Since many states have constitutional provisions which prohibit the abrogation or limitation of actions for damages, an interpretation of the Uniform Act's disclaimer which would limit the common law right to sue for injuries caused by malpractice would be presumptively unconstitutional.[62]

Since the Uniform Act might be construed to mean that doctors are authorized, if acting in "good faith," to extract organs from bodies without fear of liability and are also authorized to use their own judgment in determining the point at which transplantation can be commenced without judicial "second-guessing," there arises the obvious danger that the disclaimer (section 7 (c)), might be interpreted to immunize *all* death determiners from liability so long as they acted in "good faith," rather than only those who acted non-negligently.[63]

> A person who acts in good faith in accord with the terms of this Act or with the anatomical gift laws of another state or a foreign country is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act; *provided that nothing contained in this or any other clause of this Act shall be construed to exculpate the negligence of any physician, surgeon, or other medical attendant in rendering or discontinuing medical treatment to a patient.*[64]

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[62] *See* 2 LOUISELL & WILLIAMS, MEDICAL MALPRACTICE § 21.36 at 594.27-.29 (1969). *See also* Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 420, 300 P. 958, 959 (1931).

[63] "Good faith is 'without culpable negligence,' or a wilful disregard for the rights of others." Whitney v. Huntington, 37 Minn. 197, 201, 33 N.W. 561, 563 (1897). "Bad faith is stronger than the idea of negligence." Warfield Natural Gas v. Allen, 248 Ky. 646, 655, 59 S.W.2d 534, 538 (1933).

[64] Luyties, *supra* note 45, at 768 (emphasis in original). Physicians in some states, such as Arkansas, have anticipated this problem and have initiated legislation to insulate them, to some extent, from malpractice liability in such cases. *See, e.g.,* ARK. STAT. ANN. §§ 82-410.1 *et seq.* (1960). Other states have taken the opposite position and have modified the disclaimer provision of the model U.A.G.A. *See, e.g.,* MO. ANN.

If the surgeon employed the traditional criteria of heartbeat and respiration, in our hypothetical, D would presumably be regarded as legally dead[65] prior to the organ transfer, thus obviating any difficulty.[66] If, however, the determining physicians used the cerebral-death test for the moment of death, there would be room for conflicting expert testimony,[67] especially in view of the almost universal acceptance of the heart-lung basis for death.[68] In this situation it might be possible to prove to a jury that under the circumstances of the case the certifying physician acted improperly. Furthermore, because of the absence of standardization in the time period for recording the "flat EEG" before such a determination, there is a possibility of a conflict even among the physicians present at the scene. The jury, and later an appellate court, therefore might find, on the basis of the testimony of experts and eye-witnesses,

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STAT. § 194-270 (3) (Supp. 1970) (added "without negligence," "to good faith."); MONT. REV. CODES ANN. § 69-2321 (1969) (eliminated "disclaimer"); N.C. GEN. STAT. § 90-220.7 (c) (1965) (replaced provision with "due care"); ORE. REV. STAT. § 97.290 (3) (1969) (replaced "good faith" with "probable cause").

[65] Simultaneous death disputes are the closest to a legal determination of the exact moment of death that the courts have decided. However, while adopting the conventional heart-lung criteria most do nothing but rule that one decedent predeceased another. *See, e.g.,* Smith v. Smith, 229 Ark. 579, 317 S.W.2d 275 (1958); Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961), *motion for rehearing denied,* 379 S.W.2d 548 (Mo. 1964). In the *Smith* case, the Arkansas Supreme Court held the deaths were not simultaneous, since "Mrs. Smith was [not] dead, scientifically or otherwise, unless the conditions set out in the definition existed." 317 S.W.2d at 279.

[66] *Cf.* Thomas v. Anderson, 56 Cal. App. 2d 371, 215 P.2d 478 (1950) ("[d]eath is not a continuing event and is an event that takes place at a precise time," i.e., when the "heart stops and respiration ends.") *Id.* at 482. "Actually, the use of the conventional criteria affords the unscrupulous an opportunity to manipulate the determination of the time of death for inheritance purposes. If the decision is influenced by the wishes of certain relatives hoping to inherit, he may, by unrealistically prolonging resuscitative measures determine the disposition of the decedent's property." M. HOUTS, DEATH § 1.02 (3) (1967).

[67] An example of such conflict is found in Peart, Letter to the Editor, The Times (London), June 3, 1969, at 9, col. 2: "Criteria of death in . . . patients are almost impossible to lay down but the doctor determines this once he turns off the respirator."

[68] In the past, courts have held consistently that any evidence indicating continuance of the vital functions in one person beyond the time when there ceased to be any indication of vital functions in another to be sufficient to establish survivorship. *See* Smith v. Smith, 229 Ark. 579, 317 S.W.2d 275 (1958); Thomas v. Anderson, 96 Cal. App. 2d 371, 215 P.2d 478 (1950). *See also* Sauers v. Staltz, 121 Colo. 456, 218 P.2d 741 (1950); Gray v. Sawyer, 247 S.W.2d 496 (Ky. 1952); Vaegemast v. Hess, 203 Minn. 207, 280 N.W. 641 (1938); Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961); Finch v. Edwards, 239 Mo. App. 788, 198 S.W.2d 665 (1947); Sauger v. Butler, 45 Tex. App. 527, 101 S.W. 459 (1907).

that the doctors involved were guilty of a tort (wrongful death) for having removed a vital organ from a living person.[69]

The requirements of the Uniform Act (section 7 (b) and the Mississippi statute [section 278.3-06 (a)] should, of course, go far toward eliminating the recipient surgeon's liability in this respect.[70] Nevertheless, the transplant surgeon seems to be in the center of all of these controversies, and "whether his involvement in all of the facets of the transplant procedure is real or imagined, he is nonetheless pictured in the minds of the public (and thus a jury), as being in control of every detail."[71]

Irrespectively, there may still be conceivable grounds for malpractice if, after the decedent's condition is pronounced hopeless, substantial supportive therapy is not employed. It has therefore been suggested by some commentators that transplant physicians face potential liability for failure to continue extraordinary efforts to prolong the life of the patient (e.g., stopping cardiac resuscitation, turning off the respirator, removing the needle in intravenous therapy). It has also been suggested that a physician who withdraws such life-supportive measures or who removes a critical organ before conventional death is reached is committing an act of homicide.[72] Since malpractice doctrines require the doctor to provide a level of care not substantially less than that generally available,[73] the withholding of such treatment may be difficult to justify, especially in a sophisticated clinical environment. Thus, if the defendant physician cannot show that there was "legal" death before all hope was pronounced lost, he must show that all hope was lost because of the extent of the injuries. Of course the injuries might be so extensive as to establish that common medical practice would consider the decedent's condition absolutely hopeless. Thus, the more extensive the injuries, the more difficult it would become to prove that the physician was guilty of any omission.[74] Nevertheless, with the usual injuries of a fractured skull and some brain damage, medical testimony may be in conflict as to the extent and duration of treatment that should be attempted.[75]

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[69] Luyties, *supra* note 45, at 760.

[70] *See* MODEL PENAL CODE § 3.02 (1962), Comment (Tent. Draft No. 8, 1968).

[71] Baker, *supra* note 40, at 112. Luyties notes that:

> The effectiveness of this provision will depend on interpretation of the term "participate" in relation to the terms "removing" and "transplantation." "Participate" could encompass everything from physically removing an organ, to performing an autopsy to determine acceptibility of the desired organs for transplantation, to transporting a body to a transplant center, to testing the donor for tissue compatibility, to preserving the body's metabolic functions to maintain oxygenation of the organs, to being merely a nonparticipating member of a transplant team. Of these different possible things only the last one seems certain to fall outside the scope of participation.

Luyties, *supra* 45, at 756 n.21.

[72] LOUISELL, TRANSPLANTATION: EXISTING LEGAL CONSTRAINT, C.J.B.A. FOUNDATION SYMPOSIUM, ETHICS IN MEDICAL PROGRESS WITH SPECIAL REFERENCE TO TRANSPLANTATION 7898 (Wolstenholm & O'Connor eds. 1966).

[73] *See* McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549 (1959); Sherman, *The Standard of Care in Malpractice Cases,* 4 OSGOODE HALL L.J. 222 (1966).

Moreover, public opinion is not favorable to physicians when they are defendants in transplant-malpractice actions. The transplant surgeon is prepared to resort to drastic and extreme measures to save one man's life, yet he or his representatives might do comparatively little to restore the donor.[76] The defense of the physician's judgment in such a situation (provided the "good faith" disclaimer does not exculpate the negligent death determiner) weakens further in light of some rather remarkable recent reports of recoveries where otherwise certain death might be the normal prognosis.[77]

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[74] The court in Evans v. People, 49 N.Y. 86 (1872), states that "[d]eath is the opposite of life, and death cannot be caused where there is no life." *Id.* at 90. *See* Sommer, *Additional Thoughts on the Legal Problems of Heart Transplants,* 41 N.Y. St. Bar. J. 196 (1969).

[75] "A report of the Royal Academy of Medicine in London revealed that among a group of 102 head injury victims who were still unconscious more than one month after their injury, 63 survived and 48 of them returned to their old jobs or less demanding but still productive work." Sommer, *supra* note 74, at 198. Henry K. Beecher ". . . testified at the New York State Commission on Transplant of Vital Organs that in tests on 1665 patients at Massachusetts General Hospital who satisfied the Committee's Definition of brain death, 1662 that fell into that category did not recover. The three others were victims of barbituate poisoning and never had been considered as donor candidates." *Id.* at 198 n.8. Baker has stated that, "[t]hus difficulty of refutation may not prevent the law from finding that the withholding of all therapy from a potential donor in clinical circumstances is malpractice, no matter how careful 'S' [see hypothetical *supra* at 877] was in his actual pronouncement of death. The question of the extent of the efforts that should be required to save the donor remains." Baker, *supra* note 40, at 97.

[76] "[S]ubstantial measures should be taken to save the donor—measures that are consistent as possible with those that would be made to save him if he were not a donor." Baker, *supra* note 40, at 100. This may perhaps be the greatest source of potential litigation until the public and the courts accept the concept of irreversible coma as the standard criterion for death. *Id.* "They owe a high duty to their potential donor—the duty to save his life if possible. They at the same time owe that duty to the possible recipient. Add the fact that the closer to the moment of death of the donor that his heart is removed, the greater the probability of success of the transplant, and the extreme difficulty of the decision is manifest. The rapid decline of life signs in the recipient could affect the decision that all hope is lost for the donor." *Id.* at 97.

[77] *See* Baker, *supra* note 40, at 96.

A theory supporting liability of the donor's physician has been suggested by Professor Luis Kutner.[78] The physician, he says, may be subjected to a "contractual liability," on the rationale that he owes a duty to his patient to make a proper determination as to when to terminate the relationship.[79] A breach of this duty arises when the doctor discharges the patient prematurely or discontinues treatment without giving him an opportunity to obtain other care. Even if the doctor does not formally remove himself from the case, an abandonment may still occur. The decision of the doctor to disconnect the supporting mechanism could be considered such an abandonment.[80] The court, however, could imply such a duty to continue "extraordinary treatment" only when the patient or his relatives employed the doctor in reliance upon such treatment being provided.[81] If the doctor acts to make the patient's heart available for transplantation, a breach of fiduciary duty may arise since the doctor's primary duty is to protect and treat the patient.

Hospitals may also be held liable under a theory of deprivation of civil rights.[82] With respect to hospitals administered by governments, and with the ever-increasing government involvement in private hospital operations,[83] the estate of the patient may claim denial of civil rights in deprivation of the right to life as a result of the denial of supporting machinery and excision of the organ.[84] A denial of equal protection might also be claimed on the ground that the patient was not accorded the same care provided others similarly situated. Moreover, if the hospital lacks procedural safeguards for making such determinations this might also be treated as a denial of civil rights.

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[78] Kutner, *Due Process of Human Transplants: A Proposal,* 24 U. MIAMI L. REV. 782, 798 (1970).

[79] *Id.*

[80] *See* M. HOUTS, DEATH § 1.05 (1967).

[81] One commentator has recommended that a legal decision be "forced" in these continued resuscitation cases by institution of an action by the next of kin for an injunction for or against the termination of therapy. He suggests, however, that a court is not equipped to make such a medical judgment necessitated by day-to-day changes in the patient's condition. Wasmuth, *The Concepts of Death,* 30 OHIO ST. L.J. 32, 51 (1969). *See also* M. HOUTS, DEATH § 1.06 (1967).

[82] In November, 1971, a two million dollar damage suit was filed under the Federal Civil Rights Act against the Medical College of Virginia, charging the hospital with allowing a black laborer to die so that his heart could be used in a transplant operation. It was contended that Bruce O. Tucker, the black laborer, was not granted the same privilege and immunities afforded a white person. William Tucker, the donor's brother, had previously filed a one million dollar suit, which is still pending, against the hospital for removing the heart without the consent of relatives. Also named as defendants were the state medical examiner and 11 college physicians. Arkansas Gazette, Nov. 5, 1971.

[83] *See* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964).

[84] *See* Kutner, *supra* note 78, at 798.

In Sweden, the question of the doctor's obligation to continue supportive therapy arose in 1965.[85] When an elderly patient had a cerebral hemorrhage, to spare her further agony, the doctor discontinued intravenous nourishment, which resulted in death 7 days later. At a disciplinary hearing before the Royal Medical Board, the council (two doctors, two lawyers, and a member of Parliament) was unable to decide whether the doctor had committed a crime or an act of professional neglect. The case was referred to the local prosecutor, who, after consulting the attorney general, accused the doctor of professional neglect: (1) in having shortened the woman's life by the discontinuance of therapy, and (2) in having asked permission of the patient's relatives to do so. Regarding the first charge, the court found no guilt, holding that the continuation of therapy "would not have fulfilled a medical or human purpose." As to the second charge, the court likewise thought there was no intent to share the responsibility for the decision with the relatives.[86] This case is arguably a precedent for the proposition that such futile, meaningless therapy is equally unnecessary in transplant cases.

It would seem appropriate to mention some of the observations relevant to this matter contained in a very well-considered analysis by Professor George Fletcher.[87] Fletcher begins with a familiar hypothetical involving a comatose patient with a flat electroencephalogram. According to the physician's best judgment the patient has only an infinitesimal chance of recovery; nevertheless, he possibly can be sustained (as a "vegetable") by intravenous therapy. Professor Fletcher then poses the dilemmatic question: From a legal standpoint, what should the physician do? It would be a mistake, he says, to think that legal tradition contains a clear answer. As a first step toward the solution, he points to the legal significance between acts and omissions in this context. A doctor may be civilly and criminally liable either for intentionally taking life, or for omitting to act,[88] and thus permitting death to occur naturally. If the question involves an act, the relationship between the doctor and patient is irrelevant. If it is an omission, however, that relationship is controlling. Applying this distinction, if the ceasing of the activity to artificially prolong life is an "act," the law unequivocably forbids it. If it is an omission, the analysis is more flexible. Whether it is forbidden as an omission would depend on the demands imposed by the relationship between doctor and patient. The doctor's duty to prolong life, Fletcher states, is a function of his relationship with his patient; and, in the typical case, that relationship devolves into the patient's expectations of the treatment he will receive. These expectations are, in turn, a function of the practices prevailing in the community at the time. The practices in the use of the respirator are what doctors actually do in a particular time and place. Thus, it is the customary medical standards which determine the expectations of patients and regulate the relationship, and ultimately, the law. In regulating this relationship, physicians control the extent of their own legal obligations. This conclusion generally appears to be the same as that tacitly adopted by the authors of the Uniform Act, where the determination of death is left to the sound judgment and discretion of the attending physician,[89] who will inferentially be responsible for a justification of his decision under standards fashioned and followed by his peers.

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[85] *See Doctor Cleared in Euthanasia Case,* MEDICAL WORLD NEWS 49 (Apr. 2, 1965).

[86] *Id.*

[87] 203 J.A.M.A. 65, 68 (1968). *See also* Fletcher, *Prolonging Life,* 42 WASH. L. REV. 999 (1967).

[88] Doctors generally explain their freedom from culpability on the ground that the termination of treatment is always an omission. A simpler principle would be that a homicide resulting from the termination is justified whenever the withholding of treatment would have been justified. Kutner, *supra* note 78, at 796.

Finding Professor Fletcher's reasoning persuasive, I would think it highly desirable, if not essential, for a single standard of death to be adopted.[90] The most desirable is brain death manifested by "irreversible coma." This suggestion, of course, is not meant to advocate that the decision be made in every case on the basis of absence of central nervous system function[91] alone. It is simply the recognition of brain function as

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[89] Sommer, *supra* note 74, at 201. *See also* N.Y. Times, Dec. 5, 1968, at 34, col. 2, where, in discussing a resolution passed by the American Medical Association's House of Delegates at its 22nd Clinical Convention in 1968, it is stated: "the cause of death . . . must be evident and of an irreversible type. The fact of death must be demonstrated by adequate consent and acceptable scientific evidence in the operation of the physicians making the determination."

[90]
> Whether there should be a statutory definition of death which would eliminate confusion between the legal and medical definitions, is currently being considered by the New York State Temporary Commission on Transplant of Vital Organs. This nine-man commission is under the chairmanship of Justice Erwin Shapiro of the New York Supreme Court. . . . Dr. Adrian Kantrowitz, the doctor of surgery at Maimonides Medical Center in Brooklyn, testified before the New York Commission that he was against any attempt to statutorily define death. He said that he hoped lawyers would not become too deeply involved in the issues because they are liable to "mess things up."

Sommer, *supra* note 74, at 200-01. One state, Kansas, has adopted a statutory definition of death. *See* J. Leavell, A Treatise on the Law and Ethics of Transplants 251, n. 833, 1972 (unpublished dissertation in Yale Law School Library).

[91] Some thoughtful criticism which gives pause for reflection:

> This new definition of heart donor eligibility that substitutes "irreversible brain damage" for "total death" raises more questions than it answers. Does acceptance of this concept mean that is it no longer necessary to treat, for

the crucial factor in such determinations and "that any pronouncement of death is a statement of the impossibility of continued brain function with return of consciousness and interaction of the patient with his environment irrespective of whether the determination is based on the clinical observations of cessation of heartbeat and respiration, or on facts obtained by more modern and sophisticated methods such as the EEG."[92]

When physicians employ the heart-lung standard and its concomitant of insisting that physicians continue to support circulation and respiration as long as possible, irrespective of any hope of brain function restoration, we might perforce prevent the utilization of medically indispensable resource material to patients with good chances of survival. However, to insist on such a standard means, we either close our eyes to what doctors in fact do at the present time, or require that physicians apply the practices of a generation ago rather than keep up with advancements that have been made.[93]

Marshall Houts has developed a standard for testing the physician's determination of death, as well as providing guidelines which recognize that a physician has a professional responsibility to his patient "which he can fulfill only by an exercise of conscientious and enlightened medical judgment, and that this judgment may vary as the circumstances under which it is exercised vary." Hout's definition of death is:

> example, the senile patient who would meet such criteria? How do eligible donors differ in principle from totally feeble-minded individuals? What are the implications for the inheritance of property if the heart of an intestate donor is kept beating with a pacemaker while the search for a recipient goes on and the donor's wife dies during the interval? Does this new definition of death for the heart donor open up new channels of criminal activity that will lead to the burking of patients to increase the supply of eligible donors? Let us examine the nature of this revolutionary change in our ethics and pursue its implications to their logical conclusion. Substituting irreversible brain damage for complete absence of any living manifestations in any organ as essential in the diagnosis of death forces us to examine the meaning of the phrase "irreversible brain damage." The presently recommended definition of irreversible brain damage demands a complete absence of any manifestations of brain function, all the way from the higher levels of cortical activity down through the centers governing the emotions, sensations, automatic functions, and muscular control and including the spinal reflexes, with, however, two special exceptions — the centers controlling respiration and circulation. These centers are excluded for practical and not for ethical reasons. In severely ill patients, the function of these centers can be taken over by machines that may be stopped until the diagnosis of death is made on other counts. Moreover, for successful heart transplantation, the heart must be alive if it is to benefit the recipient.

Rutstein, *The Ethical Design of Human Experiments,* DAEDALUS 536 (Spring, 1969).

[92] M. HOUTS & J. HUNT, 1 DEATH § 1.03, at 1-25 (1970).

[93] *Id.* § 1.02 (3), at 1-23. *See also* Sommer *supra* note 74, at 196; Wheeler, *Anatomical Gifts in Illinois,* 18 DE PAUL L. REV. 471 (1969); Comment, *Medico-Legal Problems With the Question of Death,* 45 CHI.-KENT L. REV. 202 (1968-69).

> Death of a human being is that point in time at which there has occurred an irreversible cessation of such of the vital functions as renders impossible a return of even a minimal degree of consciousness and interaction between the individual and his environment.[94]

He offers the following tests for determining the point of death:

> (1) An isoelectric encephalographic tracing.
> (2) Cessation of respiration if not supported by artificial means.
> (3) Cessation of circulation if not supported by artificial means.
> (4) Bilateral mydriasis (dilatation) and fixation of pupils; no reaction to light.
> (5) Failure to respond to even the most painful stimuli.
> (6) Absence of all voluntary movement, and of spontaneous spasms or muscle movements.
> (7) Absence of reflexes.
> (8) Ophthalmoscopic evidence of cessation of circulation.
> (9) Angiographic evidence of cessation of cerebral circulation.
> (10) Falling blood pressure when vasopressor drugs and artificial support are withdrawn.
> (11) Failure to react to atropine.
> (12) Continuation of observed criteria for such period of time as will permit formulation of an opinion, with reasonable medical certainty, that cerebral function has ceased irreversibly and that return of even minimal consciousness and interaction with the environment cannot be expected.[95]

Among the advantages of this joint-definition test are that it separates the definition of death from the statement of the criteria by which the fact and time of death may be determined, thus preventing any of these criteria from hardening into immutable principles of law[96] either as absolute indications that death has occurred or as essentials to such a determination. It recognizes that brain function is the crucial factor in the determination of life and death, and that any pronouncement of death is a statement of the impossibility of return of brain function. This is true whether based on the classical clinical observation of heartbeat, respiration, reflexes, and response to stimuli, or upon facts determined by more modern and sophisticated methods such as electroencephalography and electrocardiography. In this respect it acknowledges that deaths may have occurred even though heartbeat and respiration may continue with the aid of artificial support,[97] and conversely, that although spontaneous respiration and heartbeat have ceased, life may still be present. It places primary responsibility for the decision upon the physician rather than surrounding him with rigid criteria which he must apply in every case. This joint-definition test avoids a dual standard by which a person may be considered dead for one purpose but alive for another. Also, it recognizes that death may occur under circumstances which, from the standpoint of evidence available for its medical determination or proof in litigation, are less ideal, and would permit a determination on the evidence available without necessity for carving out exceptions from a more rigidly formulated definition and criteria. Another advantage is that it would permit, without reformulation of concepts, the recognition by the courts of advances in science and technology and their consequent changes in medical thought and practice.[98]

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[94] M. HOUTS & J. HUNT, 1 DEATH § 1.03 (1970).

[95] *Id.*

[96] "If science could provide some clear, unequivocal facts about death then perhaps the law could change its mind. Such facts can be established, however, only on the basis of a comparison definition of life. It is merely survival. And as more is learned about such things as the role of DNA will we discover a need to discriminate between different kinds of human life?" 1971 BRITANNICA YEARBOOK OF SCIENCE AND THE FUTURE 83; *see* Biorck, *When is Death,* 1968 WIS. L. REV. 484; Corday, *Life-Death in Human Transplantation,* 55 A.B.A.J. 629 (1969).

It is of course conceivable that the surgeon could be held accountable in damages for making the decision to perform the transplant on a particular recipient because of lack of acceptable standards as to when a transplant is really necessary. This would be the case if the plaintiff could establish that the physician did not use proper judgment in his decision and that the transplant may have shortened the recipient's life (even if he survived for a period of time).[99] Prior to the operation the physician must first decide whether or not the transplant, a severely drastic and novel surgical procedure, is the patient's only hope for prolongation of life or for a preferred period of improved life. The physician's judgment may well be the decisive factor in the decision. The burden of proving that the recipient would have lived longer without the operation would be perhaps insurmountable, especially without supportive testimony from other physicians associated with the recipient. The physician's judgment, made in the light of his medical knowledge and training, is unique among cases because of varying degrees of disease and different characteristics of patients. Thus, his judgment may be virtually impossible to refute. Presumably, there would be present a progressive deterioration in the patient's blood pressure and respiration, and an overall decline in the heart's ability to sustain life.[100] Also, the following factors would likely be considered significant: (1) A patient in a condition that warrants a transplant may have difficulty surviving the operation. (2) The transplantation is not a permanently corrective treatment at the present time. Thus, if the recipient had shown any signs of improvement from the time he was designated a potential recipient until the actual transplant, this could be a significant factor in the malpractice claim, and could be established by competent evidence.

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[97] "The French, by providing a legal definition of death, have put the protection and the prestige of the law behind transplant surgeons removing organs while artificial maintenance continues the respiration and circulation of the donor." Myers, *supra* note 12, at 255.

[98] M. HOUTS & J. HUNT, *supra* note 92, § 1.05 at 1-4, Robertson & Jacob, *The Significance and Future of Organ Banking,* 74 CASE & COM., 21 (1969).

[99] Baker, *supra* note 40, at 103.

For these reasons it would appear advisable that the transplant surgeon lessen the chances for liability by referring this "necessity decision" to an independent committee.[101] This would also have the desirable social utility of insuring adequate supervision and responsibility for all such operations. Moreover, and equally as important, legally valid efforts to prolong and add quality to life would be relieved of the retarding effects such litigation might create. The Uniform Act will probably be construed as giving the legal imprimatur to transplant operations, thus, removing all such procedures, including cardiac, from the anathematized category of "purely experimental," and thus possibly subjecting physicians to "strict liability" for performing operations which are ultra-hazardous in nature.[102] Therefore, the operations would be "inside the law," as it were.[103] The legality of the operation itself, involving any organ, appears to be no longer questionable in those jurisdictions which have adopted the Uniform Act. Any liability would be contingent on some factor other than the nature of the operation itself, such as failure to obtain a legally valid consent.[104] Patients are presumed to consent to their physician's use of ordinary and accepted techniques. If the physician wishes to use a technique or method other than that generally accepted as therapy, he has a duty to obtain the patient's consent thereto. Failure to do so or subsequent failure to observe a reasonable standard of care subjects him to liability.[105] In absence of negligent execution of the novel procedure, however, there is no recourse to a malpractice action when consent has been obtained.[106]

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[100] *Id.*

[101] Compare "The Committee of National Health and Medical Research Council of Australia drew up an elaborate proposal for the conduct of organ transplant operations. One interesting feature of the proposal was the requirement that two medical teams be involved — one for deciding when further medical treatment of the donor has become useless, and a second for carrying out the operation." 1970 ENCYCLOPEDIA BRITANNICA YEARBOOK 461 (1970). Interesting, Dr. Denton Cooley has declared that if legal problems continue to grow involving transplants the resultant pressure may force surgeons to entirely abandon this procedure. MED. WORLD NEWS, Aug. 9, 1968, at 22.

[102] The leading cases supporting a physician's malpractice liability for injuries resulting from untried treatment (experimentation) are Carpenter v. Blake, 60 Barb. 488 (App. Div. 1871), *reversed on other grounds,* 50 N.Y. 696 (1872). In this case the defendant attempted treatment of a broken leg by placing the patient's injured limb in a "heavy steel thing that had teeth." The court declared that a patient comes to a doctor expecting his treatment to conform to established professional standards. Hence, the use of unconventional forms of treatment is at the practitioner's peril, absent an informed consent. *See also* Graham v. Doctor Pratt Institute, 163 Ill. App. 91 (1911); Hailes v. Raines, 162 Mo. App. 46, 141 S.W. 917 (1911); W. PROSSER, THE LAW OF TORTS 508 (3d ed. 1964).

It is well settled that a physician who acts negligently in treatment of a patient will subject himself to liability.[107] There is also the possibility of a malpractice action for failure to make a reasonably proper match between the donor organ and the recipient. For example, it would be obvious, even to a layman, that it would be indefensible to transplant a heart from an elderly person into an adolescent.[108] The same would appear true where there is unusual disparity in size between the two organs. The placing of a smaller organ in a larger cavity apparently diminishes the chance of success, since a smaller heart should not be able to circulate a system which previously required a much larger one. Dr. Denton Cooley evidently makes a practice of matching body weights to presumably match the work potential of both hearts.[109]

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[103] *See also* Segal, *Medical Malpractice in an Organ Transplant Case,* 15 PRAC. LAW. 65-66 (1968), wherein it is said: "[i]t is not medically conceded that heart transplants have gone past the investigational stage of medical progress."

[104] Whenever the proposed medical procedure, diagnostic test, or course of therapy constitutes a departure from what is considered merely routine procedure (e.g., taking patient's pulse, checking heartbeat, testing reflexes, etc.) and involves an added element of risk to the patient's welfare, the courts have imposed the requirement that the physician first obtain the patient's informed consent. Failure to do so will subject the physician to liability.

U.S. DEP'T OF H.E.W., LEGAL ASPECTS OF PUBLIC HEALTH SERVICE MEDICINE 36 (1970).

[105] *See* Fortner v. Koch, 272 Mich. 273, 261 N.W. 762 (1935); Comment, *Medical Experiments: Insurance,* 70 COLUM. L. REV. 965 (1970).

[106] Baker, *supra* note 40, at 96.

[107] "A physician is bound to bestow such reasonable ordinary care, skill and diligence as physicians and surgeons in good standing in the same neighborhood in the same general line of practice, ordinarily have and exercise in like cases." Copeland v. Robertson, 236 Miss. 95, 110, 112 So. 2d 236, 241 (1959); Everad v. Hopkins, 80 Eng. Rep. 1164 (K.B. 1650).

[108] Baker, *supra* note 40, at 105.

[109] Cooley, *Minutes of the Cape Town Meeting,* MED. WORLD NEWS, Aug. 9, 1968, at 22.

It is certainly arguable that a half-sized heart seems obviously insufficient and that the transplant means almost certain death for a patient who otherwise might have been supported by artificial means pending arrival of a more suitable donor.[110] In time, after more research, the degree of similarity will evidently be established, providing a legal test setting the limits of permissible discrepancy as to the donor.

Undeniably neither the Uniform Act nor the Mississippi statute insulates a transplant surgeon from ordinary malpractice liability. Thus, if he "bungles the job" or fails to demonstrate requisite skill he will not be shielded by the Uniform Act.[111] The usual standard, of course, is whether in his performance he has possessed and exercised the degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession in the community. Since the transplant operation cannot, at this stage of development, be regarded as a "regular medical practice," how are the components of this standard of care (skill) applicable to transplant medical personnel to be ascertained? The following questions are pertinent to the formulation of such standards:[112] (1) Since malpractice doctrines require that the doctor provide a level of care not insubstantially less than that generally available, does the standard practice in the particular locale of the suit, where possibly few, if any, similar operations have been performed, have to conform with the practice in the larger national community? (2) Should the standard be based on the transplantation of the same organ, or on transplantation generally? (3) What bearing will the accumulated experience of all of the transplant surgeons with a particular organ have on this formulation?[113]

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[110] Baker, *supra* note 40, at 105.

[111] The following general conclusions were drawn by Attorney Melvin B. Bishop from a large number of malpractice cases:

> (1) One licensed to practice medicine is presumed to possess that degree of skill and learning of the average member of his profession in the same locality. (2) Before a physician or surgeon can be held liable, he must have done something in the treatment of his patient which the recognized standard of good medical practice in the community forbids in such cases, or he must have neglected to do something which standard requires. (3) To sustain a verdict of malpractice, the standard of local practice must be shown by affirmative evidence. Unless there is evidence the jury may not speculate as to what required standard is, or whether he has departed from it. (4) Negligence is never presumed but must be affirmatively proved and no presumption arises from the mere fact that the treatment has been unsuccessful, failing to bring the best results, or that the patient has died. (5) Negligence by reason of departure from proper standards must be established by expert testimony, unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it. (6) The testimony of the physicians that they would have followed a different course of treatment is not sufficient to establish malpractice unless it also appears that the treatment deviated from one of the standard methods. . . .

Bishop, *Medical Malpractice,* 36 MISS. L.J. 287, 288 (1965). No system which embraces fundamental professional relationships eventually involving ethical risks of individuals can remove personal liability.

[112] "It is impossible to state in general terms what constitutes reasonable standards of medical care and practice . . . this question can be as complex as the question of what constitutes informed consent, and the answer to it varies with the individual circumstances of the case in which it arises." Dunphy, *The Story of Organ Transplantation,* 21 HAST. L.J. 67, 70 (1970); PFIZER LABORATORIES SPECTRUM 20 (1966).

The codes, rules, and standards recently established by the medical community itself will doubtlessly be considered. Because of the investigative aspects of transplantation the practice would be subject to these ethical guidelines. Although these rules are not law in the technical sense, they have some of the attributes of law,[114] since they are generally acknowledged within the group as general norms and thus recognized by the courts as indicia of acceptable conduct.

In the absence of any illuminating decisions dealing specifically with transplantations it would appear that doctors engaged in such procedures would be subject to the existing body of malpractice law, as well as a potential conflict-of-interest problem.

CRIMINAL LAW AND TRANSPLANTS

When an organ donor's life is artificially sustained and a vital-organ transplant attempted, the legal rights of the donor are uncertain and the criminal liability of the physicians involved remains unclear. This uncertainty results from the disparity between the legal and medical definitions of death.

While heart removal in the days of the rack and screw was not regarded as a particularly efficient means of killing, being too "messy," it was nevertheless considered effective and receives more than passing mention in the literature of torture and inquisition (and even "religion," e.g., Aztecs).[115] Of course, today's transplant physician is acting to cure and not to kill in replacing the diseased vital organ. Yet, in a time when the number of transplants are relatively few and the rate of success low, it can be argued that the transplant surgeon runs an appreciable risk of prosecution for criminal conduct. While the risks of civil liability have apparently been obviated to some extent by adoption of the Uniform Act, and by execution of release forms, the risks of criminal proceedings would still seem to be present, partly because of the vagueness of the term "good faith" in the Act.[116]

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[113] PFIZER LABORATORIES SPECTRUM, *supra* note 112.

[114] *Id.*; Stickel, *supra* note 20, at 52. These codes and rules are: (1) The Nuremberg Articles (1946); (2) American Medical Association's Principles of Medical Ethics (1946); (3) National Institute of Health Guiding Principles in Medical Research Involving Humans (1953); (4) World Medical Association's Code of Ethics—Declaration of Helsinki (1964); (5) United States Public Health Service Policy and Procedure Order No. 129 (1966); (6) American Medical Association's House of Delegates, Ethical Guidelines for Clinical Investigation; and (7) American Medical Association's Heart Transplant Guidelines.

[115] *See generally* A. VERRILL, THE INQUISITION (1931).

Generally, under the criminal law it is incumbent on a person to act only in limited circumstances, depending upon his relationship with another, being free to omit all but the most basic and ordinary acts expected. Thus, when a doctor fails to provide certain treatment, he has merely made a value judgment dictated by his training and experience. The *mens rea* (guilty intent) is lacking, which perhaps explains why there is no known case where a doctor has been successfully prosecuted for omitting treatment. Nevertheless, it is conceivable that a doctor might be found to have committed a crime in disconnecting a mechanical supportive device in order to facilitate a transplant. He might be found to have acted wilfully, knowing that the patient would "die" (using the conventional criteria). Of course, if he could establish that he did not alter the normal course of events by turning off the machine (i.e., the condition was irreversible and death was thus inexorable and imminent) the act might be found to have been justifiable. Thus, under these circumstances the withholding of treatment might be found legally permissible.

It is apparent that using the traditional definition of life, the surgeon who removes a beating heart for transplantation, upon a "premature" declaration of death, could be found to have committed a "technical murder."[117] To a lesser degree, perhaps, the surgeon who cuts out the diseased heart of a recipient in such an operation might conceivably be charged with criminal culpability upon the recipient's death.[118] Under ordinary conditions the excision of the "failing heart" would be tantamount to killing. Here, even under the most optimum clinical circumstances, the patient must be capable of retaining sufficient vitality to withstand the rigors and demands of the most draconian of operations. If either the graft or the patient's physical reserves fail he will surely die. Thus, in effect, the surgeon will have killed him by accelerating his demise, no matter how lofty the surgeon's motives in trying to prolong life or to make it more satisfying.[119]

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[116] U.A.G.A. § 8 (c), which states: "A person who acts in good faith in accord with the terms of this act on the anatomical gift laws of another state (or foreign country) is not liable for damages in any civil action or subject to prosecution in any criminal proceedings for his act."

[117] The opinion was proffered by D. Louisell that a physician who withdrew the mechanical supports or who removed a vital unpaired organ before conventional death was committing an act of homicide. It has also been suggested that a possible prosecution for murder under such circumstances might be justified because the three requirements for proving murder would be met: malice aforethought (or intent that death should result), an act that resulted in death, and a lack of justification or excuse. D. Louisell, *supra* note 72, at 78, 98. *See* Fletcher, *Prolonged Life,* 42 WASH. L. REV. 999, 1000, 1007 (1967); Taylor, *A Gift of Life,* 70 J. KAN. MED. SOCY. 87 (1969).

[118] *When is a Transplant a Legal Murder,* THIS WEEK, NOV. 17, 1968, at 3.

The *Potter* case in England has been the subject of considerable scholarly dispute and discussion in medical and legal circles.[120] In that case, Potter, aged 32, had received severe head injuries (four skull fractures and extensive brain damage) in a public-house brawl on June 16, 1963, in Newcastle-upon-Tyne. Fourteen hours after being brought to the Newcastle General Hospital, he stopped breathing and was then attached to a respirator for a period of 24 hours, during which one of his kidneys was transplanted. The consent of his wife and the attending coroner were obtained before the removal. On June 17, when the respirator was turned off, there was no spontaneous heartbeat or respiration. An inquest was held at which a pathologist testified that death was due to the head injuries and that the extraction of the kidney had nothing to do with the death. Another physician testified that he thought that Potter died when he stopped breathing on June 16, "though from a legal point of view he might have died when circulation ceased and the heart stopped beating on the 17th." The coroner, who thought that the patient was alive when the kidney was removed, stated that his consent was based on the supposition that the organ would be removed after death. They did not feel, however, that the physician had committed any offense. It was apparently determined that the death occurred on the 16th of June, though the conclusion was somewhat ambiguous. No action was taken against the physician and the assailant was convicted of manslaughter.[121] The case once again emphasizes the difficult problems associated with the dual concepts of death.

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[119] Acting to terminate life is first-degree murder. This is true regardless of the motives of the actor. At one time in the evolution of the Common Law of murder it might have made a difference whether a man was moved by emotions of spite or by emotions of mercy. One speaks of the element of emotions of spite or by emotions of "malice" in the Common Law definition of murder. But, surely a man does not kill maliciously if he kills in order to save another man from unbearable suffering. The concept of malice lost its force in the evolution of the Common Law. As early as the 16th and 17th Centuries it came to mean no more than the requirements that the killing be intentional. Since a man killing for each reason of mercy does kill intentionally, he also kills maliciously — at least according to the special dictionary of the law. Killing for reasons of mercy, like killing in order to rob one's victims, is murder. But one should recognize that here statements of the law are a statement of principle only. There is a gap between the law in theory and the law in practice. That the legal norm is severe and uncompromising does not mean that the people who administer the legal system are also severe and uncompromising. Prosecutors or grand juries may fail to indict someone who is clearly guilty of intentional euthanasia; judges and juries may acquit someone who is guilty on the facts (of technical homicide).

Apocrophal, Time, Dec. 15, 1967, at 71. *See also* Robitscher, *Changing Concepts of Criminal Responsibility,* Legal Med. Annual (1969).

[120] 4 Med. Sci. L. 59 (1964).

According to an analysis of the *Potter* case by Professor D. W. Elliott, Solicitor of the Supreme Court and Dean of the Faculty of Law at University of Newcastle-upon-Tyne,[122] if a jury had found death to have occurred on June 17, after the transplant, the consent of the wife would have been invalid, since the kidney removal was of no therapeutic value to Potter. Furthermore, since the patient died with the discontinuance of the supporting apparatus, the surgeon would be guilty of homicide, absent a recognition of euthanasia, as well as assault and battery. The difficulty turned on justifying the use of the mechanical life supporter after June 16, while contending that Potter died on the 16th. The problems in this case obviously arose from the disagreement, though tacit, as to the standard for determination of death. Evidently Professor Elliott was refusing to accept the cerebral-death (irreversible coma) concept.

A somewhat similar situation arose in Texas. There Dr. Joseph Jachimczyk, the Chief Medical Examiner of Harris County, was confronted with the problem of having to perform an autopsy on a homicide victim, who had been a heart donor. After the operation the coroner raised a question as to the establishment of the cause of death of the victim. He questioned whether the examiner could complete his report and testify in a competent manner at the accused-assailant's trial if injuries to the body without the heart were insufficient to account for death, and whether the assailant under such circumstances could be convicted.[123] With this type of legal contretemps in view, committees

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[121] M. HOUTS & J. HUNT, *supra* note 92, § 1.06 at 1-59; Elkinton, *The Dying Patient, the Doctor, and the Law,* 13 VILL. L. REV. 740 (1968); Halley & Harvey, *Medical and Legal Definitions of Death,* 204 J.A.M.A. 423 (1968); Williams, *Renal Transplantation From Mortally Injured Man,* 2 LANCET 294 (1963); Baker, *supra* note 40, at 85; *Foreign Mail,* 185 J.A.M.A. 993 (1963); *Moment of Death,* 2 BRIT. MED. J. 394 (1963).

[122] 4 MED. SCI. L. 77 (1964).

[123] The assailant was convicted of manslaughter. The decision possibly was based on the principle of causation expressed in Annot., 100 A.L.R.2d 769 (1965):

> [W]ith respect to a mortal wound, that is, one which is necessarily fatal, the same rule applies regardless of the jurisdiction, and it is well established that the person who inflicted such an injury is criminally responsible for the death of the injured person even though it immediately resulted from medical or surgical treatment and regardless of whether such treatment was proper or negligent, on the ground that the original wrongful act was the proximate

composed of legislators and physicians in Texas recommended legislation to amend the rules of evidence in criminal trials to make inadmissible any evidence tending to show that the donor-victim's heart was still beating when he was pronounced dead and his heart removed.[124]

Sweden's "Crafoord Case," which occurred in 1965 at the Karolinska Institute, has also been the subject of a great deal of discussion because it illustrates rather dramatically the "all hope is lost" approach to the transplant donor's death, which has been a disturbing factor to some moralists. In that case the donor, a woman of age 40, had suffered a cerebral hemorrhage and was comatose. After her condition was pronounced hopeless on the basis of a flat EEG (but before respiration had ceased), the transplant was performed with her husband's consent. She "died" in the respirator 2 days later following removal of her kidney. The case provoked such controversy that it was investigated by the disciplinary committe of the National Board of Health, the Attorney General, and the Stockholm prosecuting attorney, to determine if legal action was warranted. Professor Crafoord, chief of the Thoracic Clinic and a distinguished Swedish heart-lung surgeon, assumed responsibility and said that he and his staff had previously agreed that in a case where the chance of survival was, with 100 percent certainty, deemed hopeless, a kidney could be removed. The reason, of course, was that the chance of success of the transplant would be reduced if cessation of heartbeat and respiration had to be awaited. Final disposition of the case was apparently never reported, although the Royal Medical Board found that death occurred when heart activity stopped.[125] Thus, para-

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> cause of death, the subsequent treatment with its attendant risks being foreseeable and a consequence of the original wrongful act.

Id. at 774.

It has been suggested, with some plausability, that should adherence to conventional criteria of death be required the longer artificial life maintenance is continued the more difficult it correspondingly becomes to establish causation. M. HOUTS & J. HUNT, *supra* note 92, § 1.02 (3) at 1-19. *See also* Baker, *supra* note 40, at 85; MED. TRIB., May 13, 1968; MED. WORLD NEWS, July 12, 1968, at 10; MED. WORLD NEWS, May 24, 1968, at 11; N.Y. Times, Aug. 5, 1968, at 1, col. 8; N.Y. Times, May 13, 1968, at 18, col. 3.

> Donor May be Victim of Murder; Heart Transplant Called Off: Standard University Hospital said Wednesday that plans for a heart transplant operation were abruptly called off when it was learned that the proposed donor's death was under investigation as a possible murder . . . Authorities first believed he was under investigation as a possible murder . . . authorities first believed he was under investigation as self-inflicted gunshot wound in the head. But Butte County Sheriff's Capt. Richard Stanberg later advised Stanford authorities that . . . had been booked on suspicion of attempted murder.

Arkansas Gazette, Oct. 24, 1970, at 24A.

[124] Baker, *supra* note 40, at 100.

[125] *See* Wasmuth & Stewart, *supra* note 12, at 467, 494.

doxically, since the patient was alive her consent was necessary. In such cases, under Swedish law consent of next of kin is unrecognized.

Though it would seem, as a practical matter, that a district attorney is not likely to treat such activities as criminal, it must be conceded that the potential for such action nevertheless exists. This was clearly demonstrated in August, 1968, when two officials of Santa Clara, California, a coroner and a county executive, requested the district attorney to determine whether a criminal complaint could be issued against surgeon Norman Shumway, who had transplated a heart into Leon Drake. The officials charged that an autopsy was required to determine the cause of death before any organs could be removed. The failure of the surgeon and the hospital to notify the coroner until 3 hours after the operation was one of their specific complaints.[126] Apparently, the district attorney decided not to present their grievance to the Grand Jury as nothing more was officially done about the matter. Irrespectively, the incident shows that a criminal proceeding is a latent possibility and could be converted into reality in the hands of a crusading or publicity-seeking official.[127] The outcome before a jury is, of course, highly problematical and largely dependent upon the direction of public opinion concerning such operations, which would presumably be an amalgam of press indoctrination and public response to the progress or failure in the future of these procedures.

CONCLUSION

Although the spectacular displays of the news media and the great public interest generated therefrom have given transplant operations an aura of a magical gift of life, they are in fact merely medical methods of the most sophisticated kind and by their very nature attended by the most awesome risks. Some of the major legal problems created by outdated laws, however, have furtunately, been removed by the almost unanimous adoption of the Uniform Anatomical Gift Act, hopefully leaving the transplant doctors to devote their best efforts to the perfection of a promising life preserving or prolonging technique. One of the major problems, that of uncertainty of legal liability with respect to donation of an organ at a critical period, has definitely been largely alleviated. While the great publicity accompanying transplants may encourage some surgical teams to undertake these operations when professionally unprepared, most are apparently highly skilled and acting with the noblest of intentions.

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[126] Arkansas Gazette, Aug. 24, 1968, at 3A.

[127] Sommer, *supra* note 74.

The eminent scholar and teacher, Wigmore, once reminded us that "reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living."[128] It appears that by acceptance of the Uniform Anatomical Gift Act, though conceding some of its imperfections, we have indeed not abdicated that high duty to ourselves or to society.

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[128] J. WIGMORE, EVIDENCE § 2221, at 196 (McNaughton rev. ed. 1961) (3d ed. 1940).

COMMENTS

EQUAL PROTECTION AND STANDARDIZED TESTING

Titles shall ennoble, then,
  All the Common Councilmen:
Peers shall teem in Christendom,
  And a Duke's exalted station
Be attained by Competitive Examination.*

I. Introduction and Scope

There have recently been significant developments in the law that have initiated a re-evaluation of the social and legal implications of the use of standardized tests. These developments are largely the result of a tremendous increase in the use of such tests. As early as 1963, one researcher concluded ". . . it is probably safe to say that there are more ability tests being given annually in the United States than there are people."[1] From 1957 until 1966, the use of standardized tests doubled.[2] When one considers the critical manner in which these tests are employed, it is certainly understandable that interest in their validity has heightened in recent years.

An examination of standardized tests is complicated by a number of legal and psychological problems. Although a survey of the psychological information available as to the validity of standardized testing is essential to an understanding of the legal problems involved, there will not be an indepth analysis of the validity of standardized tests because ". . . even among men of recognized professional competence and expertise in testing, there remain serious differences in respect to data interpretation."[3] This is largely a result of the fact that ". . . the

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*Chance v. Board of Examiners, 330 F. Supp. 203, 204 n.1 (S.D.N.Y. 1971) (*quoting from* Gilbert and Sullivan Iolanthe, Act I).

[1] D. Goslin, The Search For Ability 54 (1963). The author also points out that 75 to 90 percent of the public school systems in the United States give standardized tests to the students before completion of high school. *Id.* at 57. Undoubtedly this figure has increased since 1963.

[2] W. Mehrens & J. Lehman, Standardized Tests in Education 5 (1969).

[3] Ash & Ruch, *Comments on Psychological Testing*, 69 Colum. L. Rev. 608, 615 (1969). This was written as a reply to a note written on the legality of standardized tests. Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 Colum. L. Rev. 691 (1968) [hereinafter cited as *Legal Implications*]. These approaches to the problem of testing are an example of the divergent views that exist in this field.

subject involves an inexact, evolving science where very few premises are yet generally accepted and numerous variables emerge in the context of widely differing employment situations."[4] The confusion surrounding the use and validity of standardized tests and evidence that indicates possible racial prejudice has prompted at least one organization, the National Education Association Center for Human Relations Conference on Testing, to call for a halt of the use of standardized tests.[5]

The most widely known and analyzed legal development has been the adoption of Title VII which created the Equal Employment Opportunity Commission and set up regulations to insure fair employment practices in hiring and promotion.[6] Some of the most significant aspects of Title VII are the guidelines adopted to measure test validity.[7] The provisions aimed at requiring the use of valid tests as a prerequisite to employment have resulted in strict standards being applied to determine the relationship between performance on a standardized test and the ability to perform a job.[8] This relationship is required because it is a generally accepted fact that blacks do not perform as well on standardized tests as whites.[9] In order to prevent the use of tests solely for the purpose of discrimination, Congress has regulated their use. The original version of the Equal Employment Opportunity Act did not apply to public employers,[10] but the Act was amended in 1972 to include them.[11]

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[4] Davis v. Washington, 352 F. Supp. 187, 189 (D.D.C. 1972). The search for innate ability has been described as an epistemological exercise. *Legal Implications, supra* note 3, at 692, *citing* Interview with Morton Fried, Chairman, Department of Anthropology, Columbia University, in New York City, November 16, 1967.

[5] Note, *The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children,* 61 GEO. L.J. 1027, 1032 n.16 (1973).

[6] 42 U.S.C. §§ 2000e to 2000e-15 (1970). For a comprehensive evaluation and review of Title VII see *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971); Comment, *Validity of Standardized Employment Testing Under Title VII and the Equal Protection Clause,* 37 MO. L. REV. 693 (1972).

[7] The regulations dealing with testing procedure and validity are contained in 29 C.F.R. §§ 1607.1 to 1607.14 (1972).

[8] The minimum standards for validation of employment tests are presented in 29 C.F.R. § 1607.5, which requires that empirical evidence of test validity must be based on accepted psychological procedure. This section also generally defines the relationship that must exist between performance on a test and the job for which it is being used.

[9] *See, e.g.,* W. MEHRENS & J. LEHMAN, *supra* note 2, at 283-86; T. PETTIGREW, A PROFILE OF THE NEGRO AMERICAN 100-35 (1964); Adler, *Intelligence Testing of the Culturally Disadvantaged: Some Pitfalls,* 37 J. NEGRO ED. 364 (1968); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598 (1969); O'Neil, *Preferential Admissions: Equalizing Access to Legal Education,* 1970 U. TOL. L. REV. 303 (1970).

Since the original provisions of Title VII did not include coverage for public employers, suits alleging discriminatory practice by public employers were brought under section 1981[12] and section 1983[13] alleging violation of the equal protection clause of the 14th amendment.[14] The developments under the equal protection clause have not attracted as much interest as the Title VII cases, but the long range application and effect of the developing rule of law under this clause as it applies to standardized tests could have an enormous impact on several major American institutions and their manner of operation. The purpose of this comment is to examine the law that has been and is likely to be applied under the 14th amendment. As much as is practicable the Title VII cases will not be involved in this discussion because they are adequately covered in several recent articles.[15] However, the two areas of testing have become so inextricably interwoven that an examination of one area necessarily entails a partial evaluation of the other.[16] Many of the cases that have arisen under the 14th amendment can now be brought under Title VII as a result of the 1972 amendment.[17] The best example of this is the public-school teacher, who prior to the 1972 amendment, had only a cause of action under the 14th amendment. Now suit can also be brought under Title VII. Much of the law that has developed under the 14th amendment has been developed as a direct result of challenges to the National Teachers Examination.[18] If the standards required under Title VII are more favorable to the position of the teacher, it is unlikely that future suits involving a challenge to the National Teachers Examination will be brought under the 14th amendment. However, if the 14th amendment requires more than Title VII, teachers and other public employees will still proceed under the equal protection clause. Regardless of what course public-school teachers may choose to follow in future cases, an examination of the standard of review used in the cases that challenged the National Teachers Examination will aid in a determination of what standard of review will be utilized in other cases where a standardized test is challenged.

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[10] 42 U.S.C. § 2000e (b) (1970) provides:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, and Indian Tribe or a State or political subdivision thereof. . . . .

42 U.S.C. § 2000e-1 (1970) excludes from the provisions of the act: "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institutions."

[11] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. This amendment made a state or political subdivision an employer under section 2000e and eliminated the language excluding an educational institution under section 2000e-1. 42 U.S.C. §§ 2000e-1 (Supp. II 1972).

[12] 42 U.S.C. § 1981 (1970):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[13] 42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[14] U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

For an examination of other possible legal approaches to attack standardized tests see *Legal Implications, supra* note 3.

Upon a determination of the proper standard of review to be utilized under the equal protection clause of the 14th amendment, an examination will be made of the Law School Admissions Test to determine if it satisfies the applicable criteria. This will be done to illustrate the application of the equal protection standard to unchallenged standardized tests.

There are an unusual number of problem areas involved in an evaluation of standardized tests. Some psychologists claim that the tests discriminate against racial minorities. Others claim that any discrimination is a result of cultural deprivation or socio-economic classification. The confusion is increased by the application of different standards of review by the courts.[19] These factors led one judge to comment:

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[15] *See, e.g., Developments in the Law, supra* note 6; *Testing, supra* note 6; Comment, *Employment Testing Under Title VII of the Civil Rights Act of 1964,* 12 B.C. Ind. & Com. L. Rev. 268 (1970).

[16] Cases that have arisen under the 14th amendment often use Title VII standards. *E.g.,* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969).

[17] *See* notes 10 & 11 *supra.*

[18] Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972); United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972); James v. Beaufort County Bd. of Educ., 348 F. Supp. 711 (E.D.N.D. 1971).

> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.[20]

II. A Cursory Examination of Psychological Information on Standardized Tests

Standardized tests are an attempt to measure those qualities that are believed to be important to achieving success in a chosen field. The creator of the test must first decide which qualities an individual must possess to successfully perform or complete a task. If one is able to determine which qualities are important for the successful completion of the endeavor, it must then be determined how these qualities can be accurately measured. The difficulty of accurately measuring test performance is complicated by factors such as "speed, schooling, environment, language facility, motor coordination, physical handicaps, socioeconomic class,"[21] and other unknown determinants. And, of course, there are a host of other characteristics that standardized tests do not pretend to measure, such as leadership skills, ability to articulate, and the ability to take decisive action when required.[22] It is certainly easy to understand why one expert in the field of standardized testing recently concluded that a paper and pencil test that accurately measures innate ability may never be devised.[23] The most significant evidence about standardized aptitude and intelligence tests that has resulted in a legal evaluation of their validity is that they are culturally and racially biased[24] and they bear little, if any, relationship to ability to perform a job.[25] Tests used in industry to predict job performance are considered good if there is a correlation of 0.4.[26] The validity coefficient for the best standardized test is 0.5.[27] Since a test that is considered valid in psychological terms may actually have a precarious relationship to the ability it purports to measure, it may still be unconstitutional.[28]

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[19] *Compare* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), *with* United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972).

[20] Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967).

[21] Adler, *supra* note 9, at 368.

[22] Chance v. Board of Examiners, 330 F. Supp. 203, 217 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972). The court compiled a list of characteristics of job performance including:

> leadership, skill, sensitivity to the feeling and attitudes of teachers, parents and children, and ability to articulate, to relate, . . . promote good community relations, to induce subordinates to accept directions, to work cooperatively, to criticize without creating unnecessary animosity or ill-will, to analyze and evaluate administrative problems, to take decisive action when required, to operate under stress, to initiate and promote new programs, and to instill a feeling of confidence. 330 F. Supp. at 217.

There are two essential pyschological requirements that any test must satisfy before it can be efficiently employed. The amount of error in the measurement process[29] must be equal for all participants. The measurement process must therefore measure everyone as accurately or as inaccurately as it measures everyone else.[30] The second important characteristic of a good test is that it accurately predicts external criteria,[31] such as job performance. A test may measure all individuals with the same degree of accuracy, but still not be a valid prediction of that person's ability to perform the function that the test is attempting to forecast. Predictive validity cannot be accurately obtained in the absence of measurement accuracy. If the error is in the criteria chosen to predict achievement instead of the measurement process, the test will have predictive bias. A test may satisfy both of the above criteria and still have other flaws that make its use questionable in psychological and legal circles. An example of this is psychometric bias which has been defined as:

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[23] W. Mehrens & J. Lehman, *supra* note 2, at 285. This book is geared toward individuals without a background in statistics and testing. It is a helpful tool for a novice. For additional information about the theory, practice and steps taken in the creation of a standardized test to measure ability to perform a job see *Legal Implications, supra* note 3, at 696-706.

[24] O'Neil, *supra* note 9; Cooper & Sobol, *supra* note 9, at 1637.

[25] Cooper & Sobol, *supra* note 9, at 1643.

[26] *Legal Implications, supra* note 3, at 699-700. A 0.4 correlation coefficient means that about 16 percent of the variance in job performance or grade point average can be accounted for by the difference in scores on the particular standardized test. For an interpretation of this figure see W. Mehrens & J. Lehman, *supra* note 2, at 44-45.

[27] *Legal Implications, supra* note 3, at 743.

[28] It has not yet been determined what correlation coefficient will satisfy the various standards of review that have been applied in the testing cases.

[29] The measurement process, for the purposes of this paper, is defined as the procedure used to determine what score will be assigned to an individual's responses to the test.

[30] Rock, *Motivation, Moderators, and Test Bias,* 1970 U. Tol. L. Rev. 527, 528 (1970).

[31] *Id.* at 531.

> That situation in which two or more individuals from different subcultures or races consistently receive the same observed score yet have different true scores, or vice versa.[32]

If there is a psychometric bias or a predictive bias, the test has a differential validity.[33] Differential validity is an important consideration when the legality of the use of standardized tests is challenged. If the use of the test results in unequal treatment for a particular subgroup of the population in relation to the other subgroups of the population, serious equal protection problems arise.

In attempting to determine the legal validity of the test in question the court may be inundated with different methods of validation. The two types of validity that most often confront the courts are content validity and criterion validity.[34] A test has content validity if the test items are an accurate sample of the qualities that are being measured by the test.[35] The kind of criterion validity that the courts have been concerned with is predictive validity. Predictive validity is the relationship between the test scores and performance of the function which the test is measuring. It may be the relationship between the test score and teaching performance or performance in the academic community. Although educational tests are generally better predictors than employment tests, the basic principles involved are the same.[36]

The dilemma of a court that is trying to decide the legal issues involved in an attack on standardized tests is compounded by the disagreement in the psychological community about what the standardized tests measure and what factors account for the difference in performance of various segments of the population. There is a substantial amount of evidence to support the proposition that standardized tests discriminate against lower socio-economic groups, racial minorities, or culturally deprived individuals.[37] These individuals and groups generally have not had the opportunity to assimilate the knowledge and skills that are being used to judge ability or predict success.[38] Some commentators claim that these factors result in minority students performing poorly on tests that have a heavy verbal emphasis.[39] Other studies seem to indicate that minority students perform much better in the verbal area than in reasoning and numerical problems.[40] The most controversial debate in the area of performance on standardized tests is between the geneticist and the environmentalist. Most courts and commentators who have to choose sides in the controversy adopt the position that there is no credible evidence directly connecting race with intelligence.[41] There is some evidence that supports the unpopular position that ability and intelligence are a product of one's heredity.[42] Current research indicates that heredity and environment play significant roles in a determination of intelligence and aptitude.[43] The important question is not why certain subgroups of the population have a tendency to score lower on standardized tests. The critical question is do these lower scores actually indicate that the individual will not perform as well as someone who has received a higher score? Are the scores received by minority group participants under predictions of how they will actually perform? Surprisingly, some recent studies indicate that standardized tests tend to under predict individuals from a high socio-economic or educational background.[44] Groups whose test scores over predict their actual performance are generally from nonprofessional backgrounds where there is more likely to exist an indifference to educational attainment.[45] This leads to the conclusion that the individuals who are more likely to be underpredicted by standardized tests will not be from low socio-economic groups or racial minorities. In defense of arguing for the validity of standardized tests, a speaker remarked that "[t]o argue that test scores are valid is not to claim that they are necessarily immutable irrespective of future environmental conditions, or to defend those aspects of the social system that give rise to the culturally deprived environment."[46] Test supporters argue that it is society that should be criticized, evaluated, and possibly restructured instead of the tests which are merely a measure of functional ability or inability.[47] It is also submitted by several authorities that all institutions reflect the socio-economic bias or cultural bias of the society from which they eminate and, therefore, tests that do not reflect the societal bias will be a useless tool for predicting interaction with that system.[48]

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[32] *Id.*

[33] *Id.* at 537.

[34] *See* Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) (Goldberg, J., dissenting); Davis v. Washington, 352 F. Supp. 187 (D.D.C. 1972); United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); Chance v. Board of Examiners, 330 F. Supp. 203, 216-21 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

[35] W. MEHRENS & J. LEHMAN, *supra* note 2, at 43.

[36] *Legal Implications, supra* note 3, at 734.

[37] J. CONANT, SLUMS AND SUBURBS 13 (1961); D. GOSLIN, THE SEARCH FOR ABILITY (1963); T. PETTIGREW, A PROFILE OF NEGRO AMERICANS 100-35 (1964); Adler, *supra* note 9; Cooper & Sobol, *supra* note 9; O'Neil, *supra* note 9; *Legal Implications, supra* note 3; Note, *supra* note 5.

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[38] *Testing, supra* note 6.

[39] O'Neil, *supra* note 9, at 304.

[40] *See generally Comments, supra* note 3, at 613.

[41] D. Goslin, *supra* note 37, at 123-24, 137-38; T. Pettigrew, 100-35; Cooper & Sobol, *supra* note 9; Note, *supra* note 5; Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969). One court reached this conclusion by application of the "null hypothesis" which requires proof of a relationship between two variables or assumes that no relationship exists. 343 F. Supp. 1311 n.1 (N.D. Cal. 1972).

[42] *See* Crow, *Genetic Theories and Influences: Comments on the Value of Diversity*, 39 Harv. Educ. Rev. 301 (1969); Jensen, *How Much Can We Boost I. Q. and Scholastic Achievement?*, 39 Harv. Educ. Rev. 1 (1969). For additional articles that have contributed to the debate see Wheat, *Selected Bibliography: Minority Group Participation in the Legal Profession*, 1970 U. Tol. L. Rev. 935, 950-57 (1970).

[43] W. Mehrens & J. Lehman, *supra* note 2, at 70. T. Pettigrew, *supra* note 37, at 105-07; Adler, *supra* note 9, at 368; Bane & Jencks, *Five Myths About Your I.Q.*, Harpers, February 1973, at 28; Watson, *I. Q. The Racial Gap*, Psychology Today, Sept. 1972, at 48.

[44] Rock, *supra* note 30, at 536-37.

[45] Rock, *supra* note 30; *Comments, supra* note 3.

As is the case in many other fields that require expert testimony, any reasonable finding can be supported by credible evidence. A survey of the conflicting evidence from the academic community concerning the validity and reliability of standardized tests is an indication of why there is confusion about the legal validity of such tests. One should realize that an impressive job-related name does not give standardized tests a talismanic quality. A court cannot safely assume that because a test is named the National Teachers Examination that it will accurately measure one's ability to perform in the classroom. Each standardized test that comes before the court for adjudication of its legal validity must be evaluated in the context of how it was employed. Because of the disagreement among testing experts about what effect a standardized test may have on a racial minority, different standards of review have been applied by various courts under the equal protection clause of the 14th amendment.

III. THE EMERGENCE OF A NEW STANDARD OF REVIEW

A. The Traditional Approaches

Since the adoption of the 14th amendment in 1868, several different standards of review have developed under the equal protection clause.[49] The nature of the case before the court determines which standard will be applied. The most lenient standard is "restrained review" [hereinafter referred to as the "rational relationship standard"] which has two forms. The more lenient form assumes the existence of any reasonable state of facts that would sustain the constitutionality of the challenged act.[50] When the most probable purpose is impermissible, the court may look to another purpose and sustain the statute.[51] When the second form of restrained review is applied, the court will not indulge other reasonable justifications.[52] The court will only look to the most probable purpose for the statute in determining if the classification is reasonable.[53] In either case there is a requirement that the classification under attack have a "rational relationship" to the object of the legislation.[54] The rational relationship standard has often been applied in cases challenging economic or regulatory provisions, but the Supreme Court recently applied it in a suit that involved a challenge to a sex-based classification.[55]

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[46] D. Ausubel, The Influence of Experience on the Development of Intelligence, paper presented at the Conference on Productive Thinking in Education Sponsored by the N.E.A. Project on Academically Talented Students, Washington, D.C., May 24, 1963, *cited in* W. MEHRENS & J. LEHMAN, *supra* note 2, at 185.

[47] D. Ausubel, *supra* note 46; J. CONANT, SLUMS AND SUBURBS 21 (1964).

[48] J. CONANT, *supra* note 47, at 14; A. ANASTASI, SOME IMPLICATIONS OF CULTURAL FACTORS FOR TEST CONSTRUCTION IN TESTING PROBLEMS IN PERSPECTIVE 453, 454 (A. Anastasi ed. 1966) *cited* in 61 GEO. L.J. 1027, 1064 (1973).

The Court has chosen to apply "active review" [hereinafter referred to as the "strict scrutiny standard"] when a "fundamental right" is involved in the litigation.[56] Procreation and marriage have been found by the Court to be fundamental rights.[57] The right to vote[58] and the right to travel interstate without interference[59] have also been declared "fundamental". On the other hand, the Court has refused to declare the right to a public education or to welfare benefits as "fundamental."[60] In order to justify any interference with a "fundamental right" the state must demonstrate that there is a "compelling state interest" that justifies the interference.[61] The Court also strictly scrutinizes cases where a "suspect classification" is challenged.[62] Explicit racial classifications are a "suspect classification" and require very close judicial scrutiny and a very heavy burden of justification as well as a showing that they are necessary to accomplish the objective of the legislation.[63] Although the Court has been urged to include classifications based on wealth or sex in the suspect category, it has declined to do so.[64] If a statute is being subjected to close judicial scrutiny, it is very unlikely that it will survive.[65]

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[49] For an excellent discussion and comparison of restrained and active review see Comment, *Developments in the Law: Equal Protection,* 82 HARV. L. REV. 1065 (1969).

[50] McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[51] *See* Goesaert v. Cleary, 335 U.S. 464 (1948).

[52] Reed v. Reed, 404 U.S. 71 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

[53] Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

[54] McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1968); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[55] *See* notes 49-54 *supra.*

[56] *See* notes 57-59 *infra.*

[57] Skinner v. Oklahoma, 316 U.S. 535, 541 (1941). An interference with religion under the first amendment also requires a showing of a "compelling state interest." Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[58] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[59] Shapiro v. Thompson, 394 U.S. 618 (1969). Because of this case, it has been suggested that there is no longer a distinction between a mere right and a fundamental right. The proposition is based on Mr. Justice Harlan's dissent, 394 U.S. at 658-62. Houle, *Compelling State Interest vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma,* 3 URBAN LAWYER 375 (1971).

[60] San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

B. An Analysis of the Testing Cases

There is one element of the burden of proof that most courts agree is applicable in testing cases. In a case alleging racial discrimination, the court will accept statistical proof of application of an unequal standard.[66] When the statistics indicate that a disproportionate number of blacks have been eliminated by the application of a particular standard, the burden of proof shifts to the defendant in the cause.[67] This rule has been applied in jury selection cases,[68] some desegregation cases,[69] and employment cases brought under Title VII.[70] The shift in the burden of proof under Title VII is a result of statutory authorization. The most pursuasive authority for shifting the burden of proof has been *Griggs v. Duke Power Co.*[71] which is a Title VII case that is often relied upon for guidance when a court is confronted with determining the validity of a standardized test.[72] The decisions are in agreement that the burden should also shift when standardized tests are challenged under the 14th amendment. The shift occurs because of the prohibition against racial discrimination in the Constitution and because the party who administers the test is in a better position to present evidence about its validity.[73] Moreover, it would be anomalous to require more of private employees under Title VII than is required of public employees under the 14th amendment.[74] This shift in the burden of proof under the 14th amendment when a standardized test is challenged has been a significant factor in determining the outcome of the litigation. This shift is more critical in testing cases than in other cases where it has been applied. Because of the unsophisticated nature of present testing technology, it is extremely difficult for either side to clearly show that the test is valid or invalid. Therefore, the party who has the burden of proving the validity of such tests is at a distinct disadvantage. If the burden of proof did not shift, it would be as difficult for the plaintiff to show that the test is invalid as it is for the defendant to show that it is valid. The party who has the burden of proving a proposition in a field that has few unanimously accepted principles will find himself in an untenable position. This shift in the burden of proof may be more important in the final analysis than whether the strict scrutiny standard or the rational relationship standard is applied.[75] However, it has not yet been determined with any degree of certainty how much disparity is necessary to demonstrate a prima facie case of discrimination and thereby cause the burden of proof to shift to the defendant.[76]

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[61] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[62] Loving v. Virginia, 388 U.S. 1 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); *cf.* Korematsu v. United States, 323 U.S. 214 (1944).

[63] *See* note 62 *supra.*

[64] Reed v. Reed, 404 U.S. 71 (1971) (sex classification); James v. Valtierra, 402 U.S. 137, 144-45 (1972) (Marshall, J., dissenting).

[65] Korematsu v. United States, 323 U.S. 214 (1944); DeFunis v. Odegaard, 507 P.2d 1169 (Wash. 1973).

[66] *See* Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam,* 371 U.S. 37 (1963).

[67] Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Allen v. City of Mobile, 466 F.2d 122, 122-26 (5th Cir. 1972) (Goldberg, J., dissenting); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Davis v. Washington, 352 F. Supp. 187 (D.D.C. 1972); United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972); P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).

[68] Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971).

[69] United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill. 1968).
1968).

[70] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[71] 401 U.S. 424 (1971) [hereinafter referred to as *Griggs*].

The second notable element of the standard of review in the testing cases is not as unanimously agreed upon as the first. After determining that the burden of proof should shift, the courts differ radically about whether to apply the rational relationship standard, the strict scrutiny standard, or a new standard of equal protection that is a compromise between the two traditional standards. A chronological review of the testing cases that have applied the different standards of review will be helpful in determining which standard is appropriate.

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[72] *See, e.g.,* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[73] Chance v. Board of Examiners, 458 F.2d 1167, 1173-75 (2d Cir. 1972); P. v. Riles, 343 F. Supp. 1306, 1309 (N.D. Cal. 1972).

[74] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

[75] Because of the inability of the parties to meet the burden of proof even when the rational relationship standard is applied, the shift might be the most important rule in the testing cases. Chance v. Board of Examiners, 458 F.2d 1167, 1178 (2d Cir. 1972).

[76] *Compare* Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972), *with* James v. Beaufort County Bd. of Educ., 348 F. Supp. 711 (E.D.N.C. 1971).

The first case to delve into the testing controversy involved an attack on I.Q. tests. In *Hobson v. Hansen,*[77] the court determined that the use of I.Q. tests as a means of placing school children in ability groups was a violation of the equal protection clause because it resulted in a disproportionate number of blacks being placed in lower ability groups. The opinion of the court was an indication of future decisions. In name the decision applied the more lenient rational relationship standard, but an analysis of the case indicates that the rationale behind the strict scrutiny standard was considered in the opinion.[78] The court at one point articulated the position that a standard that results in racial imbalance could be upheld if there were compelling justifications.[79] The standard of review that was actually applied was a mixture of the two traditional equal protection theories.[80]

The first litigants to successfully urge a court to adopt the strict scrutiny standard were bus drivers and collectors in Massachusetts. The black plaintiffs in *Arrington v. Massachusetts Bay Transportation*[81] demonstrated that a standard was employed by the defendant that made 75 percent of the white applicants eligible and only 20 percent of the black applicants eligible for employment. Although the court concluded that the reason for the deficiency was a result of educational and cultural deprivation and not any innate intellectual deficiency, it concluded that the strict scrutiny standard was applicable because some citizens were being deprived of a right that should be available to all.[82] The court relied on *Harper v. Virginia Board of Elections*[83] which held that classifications that invade or restrain a fundamental right, such as the right to vote, must be closely scrutinized.[84] The reason the strict scrutiny standard was applied in *Harper* was because a "fundamental right" was threatened. In *Arrington,* the right involved was the right to work which has not been declared fundamental.[85] The court went on to say that the compelling interest would certainly be satisfied if the defendants could show some relationship between the tests they were using and the job plaintiffs would be required to perform. The correlation that would be required between the test score and job performance was also a concern of the court. The issue was not resolved because the court said in this case there was no evidence of any correlation.[86] Although *Arrington* applied the strict scrutiny standard, in practice its standard is less demanding than that required in *Hobson.*

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[77] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[78] 269 F. Supp. at 508.

[79] *Id.*

[80] Note, *supra* note 5, at 1060.

[81] 306 F. Supp. 1355 (D. Mass. 1969).

[82] *Id.* at 1358.

[83] 383 U.S. 663 (1966).

[84] *Id.* at 670.

[85] *See* notes 58-63 *supra.*

After the opinion of the United States Supreme Court in *Griggs* was announced, lower federal courts began studying that opinion to determine what was required when a standardized test was challenged. Although most courts recognize that *Griggs* is an interpretation of statutory provisions, it is the only Supreme Court case in the complicated and unsophisticated testing area. The often quoted operative language of *Griggs* is that the test must "demonstrate a reasonable measure of job performance".[87] The Court's opinion of the value of standardized tests is elucidated by its conclusion that:

> History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.[88]

The *Griggs* philosophy is reflected in the case of *Penn v. Stumpf*[89] which used the Title VII case as authority for an attack on standardized testing under the 14th amendment without distinguishing between the two. The standard applied was identical to the one announced in *Griggs.* When a civil service test that was required for firemen was attacked in *Western Addition Community Organization v. Alioto,*[90] the court looked to *Griggs* for guidance but recognized that it was not controlling. The public agency was required to demonstrate a "reasonably necessary" relationship between the qualities tested and the requirements of the job.[91] *Alioto* was one of the first cases to examine the different methods of validation.[92] A determination was made that either content or empirical (predictive) validity would be acceptable. The court looked to the regulations promulgated under Title VII to justify this conclusion.[93] According to the regulations, evidence about the content validity of the test may be appropriate in determining its legality if evidence of predictive validity is not feasible. This is another example of a court looking to Title VII to determine an appropriate standard under the equal protection clause. There might be a known relationship between the subjects tested and performance on the job. Content validity certainly appears to be easier to prove than predictive validity. The test was invalidated in this case because the employer had not made a job analysis which is necessary to prove a relationship between a test and performance on the job.[94]

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[86] 306 F. Supp. at 1358-59.

[87] Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

[88] *Id.* at 433.

[89] 308 F. Supp. 1238 (N.D. Cal. 1970).

[90] 340 F. Supp. 1351 (N.D. Cal. 1972).

[91] *Id.* at 1352.

[92] *See* p. 906 *supra.*

[93] 29 C.F.R. § 1607.5 (1972).

I.Q. tests were again the subject of attack in *P. v. Riles*.[95] The court explained that if the strict scrutiny standard were applied to testing cases the defendant would have an impossible burden of proof. But since this case does not involve explicit racial classifications, only a rational relationship is required. The defendant conceded that the I.Q. tests were culturally biased but argued that they were rationally related to the purpose intended because they are the most accurate means of classification currently available. In concluding that the I.Q. tests were not rationally related to the objective of segregating students according to their ability, the judge reasoned that ". . . the absence of any rational means of identifying children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the I.Q. test as it is presently administered to black students."[96] This approach has not been as readily accepted by other courts who contend that the principles of law must be tempered by the reality of current testing technology and the state of the art. In *Davis v. Washington*,[97] the court required a heavy burden of justification which was satisfied when the defendant established that the test was job related in accordance with *Griggs*. It is not surprising that this relationship was established by accepting content validity as a permissible alternative to predictive validity. With the acceptance of content validity, the defendant was able to overcome a heavy burden of justification.[98]

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[94] Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, 1355 (N.D. Cal. 1972).

[95] 343 F. Supp. 1306 (N.D. Cal. 1972).

[96] *Id.* at 1313.

[97] 352 F. Supp. 187 (D.D.C. 1972).

[98] This case arose under the fifth amendment which provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const. amend. V. The case was initiated under the fifth amendment, because employment practices of the District of Columbia were the object of the suit.

An interesting and informative discussion and evaluation of the proper standard of review to be applied in these situations is found in the opposite conclusions of the district and appellate court decisions in *Chance v. Board of Examiners.*[99] The lower court concluded that the rational relationship standard was inappropriate because this was a case involving racial discrimination. The view that the discrimination was actually directed toward those who are economically deprived was rejected. The Board was required to make a strong showing that the test actually measured those qualities which were essential to perform the job for which the standards were being required.[100] The Second Circuit Court of Appeals affirmed the decision but refused to apply the strict scrutiny standard. The appellate court noted that the Supreme Court has never applied the strict standard in a case where unintentional actions resulted in discrimination. Even applying the rational relationship standard, the Board had failed to meet its burden of proof. This is another example of a court applying the more lenient standard and still invalidating a standardized test. Since the appellate court indicated that as much is required of public employees under the 14th amendment as is required of private employees under Title VII, the *Griggs* standard of review may be the one actually applied. This is indicated by the fact that the court looked at the content validity and determined that the procedures used by the Board were inadequate to insure its accuracy. If a test cannot withstand the rational relationship standard when the defendant is allowed to justify the use of the test by the application of content validity, it is failing the most lenient standards that can conceivably be applied in the context of these cases.

The United States Court of Appeals for the First Circuit took exception to the finding of their colleagues in the Second Circut in *Chance.* The finding of the lower court that the rational relationship standard applied was reversed by the First Circuit in *Castro v. Beecher.*[101] The opinion intimated that application of the rational relationship standard would certainly result in the use of the test being upheld regardless of its predictive validity. The application of the rational relationship standard would require only a showing that the test was rationally related to some activity required by the job. The opinion then explained that the relaxed standard was adequate only if there was no racial impact. In *Castro* the court also looked to *Griggs* as persuasive authority for the proper review under the 14th amendment. The "demonstrable relationship" language led the court to deduce that the facts presented to the court relative to the validity of the test had to convincingly establish a relationship between the test and the job.[102] Although the court rejected a rigorous application of strict scrutiny, the standard applied was identical to the strict scrutiny standard as far as that standard relates to "the substantial congruence of employment requirements to job performance. . . ."[103] The only difference between the standard of review required by this court and the traditional strict scrutiny standard is that the new standard does not require that no alternative means be available. This is apparently a compromise between the two traditional standards of review that this court thought to be appropriate in a racial-impact case. Regardless of the variance in language used by the other courts, this court decided that the same standard was actually applied in *Arrington, Penn,* and *Chance*. The *Castro* decision also addressed itself to another key issue that is often skimmed over with minimal evaluation. The court of appeals had to reconcile the finding by the district court that this case did not involve the issue of explicit or implicit racial classification. In harmony with its finding that poor performance on the test was a result of economic or cultural deprivation, the district court determined that the case was not cognizable in terms of racial discrimination.[104] The appellate court agreed that the injured group was cultural or economic in composition and not racial. In spite of that, the court was still willing to adjudicate this case on the basis of racial discrimination because other courts have accepted similar litigation by racial groups and because a determination of who is actually discriminated against would be a complex problem. Therefore, the court determined that identification of the racial group instead of a more comprenhensive group was a satisfactory solution. There is an apparent inconsistency between the finding that these tests actually discriminate as a result of economic or cultural deprivation and the identification by the court of the deprived group as racial. If the group that is discriminated against is cultural, the proper group for identification should not be racial. The racial classification would be appropriate only if one accepted the geneticist view of poor performance or if the test were intentionally employed to discriminate. Otherwise, the black plaintiffs have no unique characteristic that sets them off from any other culturally deprived individuals regardless of race. If the discrimination is not based on race, then the racial classification is inappropriate. The overwhelming acceptance by the court of the cultural deprivation explanation for poor performance, which is certainly understandable, complicates the acceptance of a racial group as the object of discrimination.

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[99] 330 F. Supp. 203, *aff'd,* 458 F.2d 1167 (2d Cir. 1972).

[100] 330 F. Supp. at 216.

[101] 459 F.2d 725 (1st Cir. 1972).

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[102] *Id.* at 732.

[103] *Id.* at 733.

[104] *Id.* at 730-31.

In 1972 the Fifth Circuit considered two cases from Mississippi that involved an attack on standardized tests which were required as a prerequisite to employment in the public schools. In *Armstead v. Starkville Municipal Separate School District,*[105] the district court decided that the graduate record examination was an impermissible standard for utilization in the teacher selection process. The appellate court agreed with the district court that the use of the graduate record examination was unconstitutional, but withheld judgment on whether or not the use of such an examination created a racial classification. It was unnecessary to make that determination because the standard was declared unconstitutional on the basis of a more lenient review announced in *Reed v. Reed.*[106] After invalidating the graduate record examination, the Fifth Circuit was asked, in *Baker v. Columbus Muncicipal Separate School District,*[107] to pass judgment on the National Teachers Examination. Unlike many of the previous cases where standardized tests have been attacked, the court determined in *Baker* that the test was actually used for the purpose and with the effect of racial discrimination. The fact that the test in this particular case was intentionally used to discriminate against blacks makes the application of the strict scrutiny standard more appropriate. The court required an overriding legitimate state purpose for justification of the use of this standard. Although the National Teachers Examination was invalidated, the court construed the standard to allow the application of an employment procedure that was clearly related to the improvement of the faculty.[108] On two other occasions, a panel of the Fifth Circuit has passed judgment on the use of standardized tests under the 14th amendment. First, in *Cooper v. Allen*[109] the Fifth Circuit agreed with the district court that the same issues were involved in this suit under the 14th amendment as are involved in litigation under Title VII. The court looked to the rationale of *Griggs* and announced that in order to justify the use of a standardized test the city had to show that the test was substantially related to job performance. Although the court did not articulate the strict scrutiny standard, it noted *Arrington* with approval. If an employer is able to demonstrate a substantial relationship between his test and job performance, then the test may be employed regardless of the the fact that it eliminates a disproportionate number of blacks. According to this decision, there is no requirement that an employer validate a test before requiring use of it; but he must be prepared to defend the test when the plaintiffs show that it has a discriminatory effect.[110] Another Fifth Circuit panel upheld a district court opinion that allowed the use of a test in accordance with the standard it derived from an evaluation of *Griggs*. The district court upheld the use of the test on a finding that it was rationally related to the job. In *Allen v. City of Mobile*,[111] a majority of the appellate court agreed with the district court. However, a manifest relationship was required instead of the more lenient rational relationship.[112] The dissent in *Allen* addresses the question of the proper standard of review for the court to rely on in the context of the 14th amendment. The dissenting opinion disagreed with the lower court's interpretation of *Griggs*. The dissent was in virtual agreement with the majority opinion of the First Circuit in *Castro*. Although the judge recognized that the Supreme Court had never required a compelling state interest for a case of unintentional discrimination, he reasoned that the best standard is strict scrutiny with the exception that the state would not have to demonstrate the lack of any alternative procedure. This amounts to a requirement that there be a substantial demonstration of a relationship between the job and the test. The different methods of validation were then analyzed by the dissenting judge. He apparently determined that either content or predictive validity could be used to demonstrate "job-relatedness".[113] In order to be legal under the 14th amendment, the judge thought that there should at least be an empirical study of the racial effect of the test in comparison with the relationship between a score on the test and job performance.

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[105] 461 F.2d 276, 279 (5th Cir. 1972).

[106] 404 U.S. 71 (1971). The court also cited Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), where the review applied was very restrained. The court was willing to assume the existence of any state of facts that could make the distinction reasonable. The *Reed* court depended on Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), which also applied a restrained review, but the court was unwilling to indulge any other reasonable justification. *See* discussion p. 919 *infra* and Comment, *supra* note 49, at 1065-90. This comment includes an analysis of *Lindsley* and *Royster Guano Co.* For an evaluation of *Armstead* see 22 BUFFALO L. REV. 655 (1973).

[107] 462 F.2d 1112 (5th Cir. 1972).

[108] *Id.* at 1114.

[109] 467 F.2d 836 (5th Cir. 1972).

The most recent inspection of the utilization of the National Teachers Examination as a hiring criteria resulted in its premiere accredidation. The sympathies of the court were understandably aligned with the dilemma of local school boards who are admonished to adopt objective standards[114] and then criticized when apparently objective standards are adopted.[115] This frustration is primarily the result of the fact that most people, including school boards, are under the illusion that a standardized test veritably measures what it purports to measure. The attempt to discover objective standards is a formidable task.[116] School boards attempting to make a good faith compliance with the requirement that objective standards be used are in a quandry. In *United States v. Nansemond County School Board*[117] the court reasoned that if subjective standards and objective standards are impermissible, the only remedy is the adoption of a quota system without consideration for individual qualifications which is the antithesis of civil rights litigation. The real problem is not whether an objective standard is permissible, but what is an objective standard. A standard that eliminates more blacks than whites and is not related to job performance could hardly be labeled objective in the context of employment criteria. The plantiffs in *Nansemond County* did not allege that the discrimination involved was intentional. The court adopted the rational relationship standard as the yardstick by which these tests should be measured. The court found that there was a valid state interest in trying to upgrade the quality of its faculty and that the use of the National Teachers Examination was reasonably related to that purpose. This court agreed with the Fifth Circuit decision in *Armstead* that the equal protection standard adopted by the Supreme Court in *Reed* was the proper one for a review of testing cases where there is no allegation of intentional discrimination. The correlation between the standard used and the valid state interest, which in this case is improvement of the quality of public school teachers, determines if the test is permissible. Under the test applied by this court there can be a "reasonable relationship" between the standard used and job performance if that standard measures one of the qualities that plays a substantial role in successful teaching performance.[118] Using his finding that only a reasonable relationship was necessary under the equal protection clause, the judge, in *Nansemond,* determined that content validity is an acceptable means of validation and implied that predictive validity may never be required.[119] One reason offered as justification for the use of content validity is that the evidence indicates that there is no demonstrable relationship between a test score and effective teaching performance. Therefore, "it seems ridiculous to say that before a test is a reasonable measure it must also do the impossible."[120] The court is saying in essence that if present technology is not sophisticated enough to create a test with a reasonable ability to predict performance, it will not require proof that it predicts performance. This is the same rationale that plaintiffs are urging upon the court, but the conclusion is different. The plaintiffs conclude that since the test is not an accurate measure of one's job performance and since it eliminates more blacks than whites, it is unconstitutional. Regulations adopted in connection with Title VII were cited by the court as authority for the proposition that content validity is sometimes appropriate.[121] Regardless of the regulations that have been adopted under Title VII, the court should examine different theories of validation as they relate to the 14th amendment. When a test is being used to determine which of several teachers will perform the best on the job, it is being used precisely for the purpose of prediction. Since it is being used to predict who will do the best job, its predictive validity is certainly the proper area of judicial scrutiny. If it is not being used for its predictive validity, then it may not be a rational means to achieve a legitimate state purpose. What legitimate purpose could a state have in employing a test that eliminates more blacks than whites if it is not to predict who is the most qualified for the job? The court noted that the Educational Testing Service could not condone the use of a cutoff score but admitted that it would be valid if there were an excessive number of applicants. The judge reasoned that this was an indication that there is some merit to score comparison and, therefore, allowed a minimum cutoff score to stand.[122]

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[110] *Id.* at 839.

[111] 466 F.2d 122 (5th Cir. 1972).

[112] *Id.* at 126.

[113] *Id.* at 129.

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[114] *See* Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969) *en banc, cert. denied,* 402 U.S. 944 (1971).

[115] Until a careful evaluation of the National Teachers Examination was undertaken, courts assumed that it too was an acceptable objective standard. Carter v. Morehouse Parish School Bd., 441 F.2d 380 (5th Cir. 1971).

[116] For examples of objective, nonracial and reasonable criteria to be utilized in the selection of school teachers see United States v. Texas Educ. Agency, 459 F.2d 600, 607-08 (5th Cir. 1972).

[117] 351 F. Supp. 196 (N.D. Va. 1972).

[118] *Id.* at 205.

It is readily discernible that after the shift in burden of proof there is a lack of uniformity in the decisions of the courts. In *Hobson*[123] the court applied what it called the rational relationship standard, but what actually appeared to be a hybrid version of the strict scrutiny standard that also found favor in later decisions. The *Arrington* court applied the strict scrutiny standard with all of its ramifications but indicated that it could be satisfied by a showing of a relationship between job performance and test score.[124] Other courts looked to the language in *Griggs* that required a "reasonable measure of job performance" as a guide in scrutinizing standardized tests.[125] The decisions in *Penn*[126] and *Alioto*[127] applied the courts' interpretation of *Griggs* to judge the validity of the test in question. The operative language in *Alioto* was that there be a reasonably necessary connection between the tests and job performance.[128] The rational relationship standard was again applied by the court in a challenge on the use of I.Q. tests in *P. V. Riles*.[129] Although the more lenient standard was applied, the court rejected the explanation that this was the most accurate measure available.[130] A heavy burden of justification was satisfied in *Davis* when the defendant demonstrated that the test met the standards announced in *Griggs*.[131] It is not surprising that there is a conflict between the circuits. The Second Circuit decided the more lenient standard should be used in *Chance*,[132] and the First Circuit applied a new standard of review that is bordering on strict scrutiny in *Castro*.[133] The language in *Chance* indicates that the court required a showing that was equivalent to the requirements of *Griggs* even though they required only a rational relationship.[134] The *Castro* court rejected the application of the rational relationship standard because of the racial impact of the test. The opinion then looked to *Griggs* and concluded that the defendant had to convincingly establish a relationship. The court explained that this review was very similar to that required in a case of strict scrutiny except that the party with the burden of proof does not have to demonstrate that there is no alternative procedure. Regardless of the language used, the court concluded that this same standard had been applied in *Arrington, Penn,* and *Chance.*[135] When standardized tests required by school districts for teacher applicants came under attack in the Fifth Circuit, the rational relationship standard announced in *Reed* was applied when there was no finding of intentional discrimination; and the strict scrutiny standard was required where the test was used for the purpose and with the effect of racial discrimination. The court struck down the use of the graduate record examination by application of the rational relationship standard in *Armstead*[136] and invalidated the use of the National Teachers Examination by application of the strict scrutiny standard in *Baker.*[137] On two other occasions, a panel of the Fifth Circuit has looked to *Griggs* for guidance in the area of standardized testing. First, in *Cooper*[138] there was a requirement that the standard be substantially related to job performance, and secondly, in *Allen*[139] the requirement was that it be rationally job related. There was also a dissent in *Allen* that argued that the proper standard was the one applied by the First Circuit in *Castro.*[140] And finally, a district court in Virginia in *Nansemond* determined that there is only a requirement that there be a showing of a rational relationship between the qualities tested and those required by the job.[141] Because of the development of the cases under Title VII, prior to the development of cases under the 14th amendment and because courts generally feel that more is required upon a showing of racial impact, a new equal protecttion standard that falls between the two traditional theories is emerging under the 14th amendment. This new equal protection standard which is couched in terms like "a heavy burden of justification," "convincingly establish a relationship," and "substantially related to job performance" is apparently closer to "strict scrutiny" than "rational relationship."[142]

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[119] *Id.* at 203.

[120] *Id.* at 204.

[121] 29 C.F.R. § 1607.1 (1972).

[122] United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972).

[123] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

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[124] Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969).

[125] *See, e.g.*, Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); Penn v. Stumpf, 308 F. Supp. 1238 (E.D. Va. 1970).

[126] Penn v. Stumpf, 308 F. Supp. 1238 (E.D. Va. 1970).

[127] Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972).

[128] *Id.* at 1354.

[129] 343 F. Supp. 1306 (N.D. Cal. 1972).

[130] *Id.* at 1313.

[131] Davis v. Washington, 352 F. Supp. 187 (D.D.C. 1972).

[132] Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

[133] Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[134] Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167, 1176 (2d Cir. 1972).

IV. An Evaluation of the LSAT

Because of the tremendous increase in the number of applications for law school admission since World War II, admissions officers have searched for an objective means to assist in the evaluation of a student's potential law school success in relationship to other applicants from different schools and backgrounds. The search for a common denominator was satisfied by the Law School Admissions Test. Although its limitations have always been recognized by those who have administered and employed the test, interest in its application and validity has increased because of the rule of law emerging under the 14th amendment. Because of the increased concern about the effect that standardized tests have on minority groups, several studies have been made to determine if the LSAT is biased against minority groups. The test is an attempt to measure one's ability to reason logically, and to read and recall.[143] A study conducted by the American Association of Law Schools indicated that the admissions test measured minority students as accurately as their classmates.[144] Several studies made by a Law School Admissions Test research group had similar conclusions. The same principles that are applicable to the total applicant group are applicable for the culturally deprived group. The culturally deprived group had a 0.31 correlation between performance on the LSAT and grades received in the first year of law school, and the other group had a 0.33 correlation.[145] An extension of the research group study also reached the conclusion that there were no significant differences in the predictive validity of the LSAT for minority students and white students, except that that in five out of six groups studied, the test scores tended to be over predictions of first year averages for culturally deprived students.[146] There is also evidence to show that the normal procedure used in test development does not result in individual items on the test that would favor either group over the other.[147] These favorable findings are convincing in light of the fact that there is ". . . no sound statistical or other scientific evidence which demonstrates that LSAT is per se prejudicial to minority and disadvantaged students."[148] The writer concluded that this may be a result of the fact that if there is cultural bias in the test it is the same kind of cultural bias that is present in society and in law schools; and the test is, therefore, as accurate for predicting the grades of minority students as it is for predicting the grades of others.[149] There are other facts that have been revealed about the LSAT that should cause concern about its use. One researcher found that the overwhelming weight of the evidence about the Law School Admissions Test indicates that it is of little practical value in predicting grades in law school.[150] His study indicated that any good achievement or intelligence test would predict law school success as well as the Law School Admissions Test. This conclusion is bolstered by another study by the Law School Admissions Test research group that discovered that the graduate record examinations advanced test showed a higher correlation with first-year law school grades than the LSAT.[151] It should be noted that the correlation between the LSAT and performance in law school is only measured by first-year grades. Even if there were a high correlation between the LSAT and first-year grades, which there is not, that does not necessarily indicate that the correlation would be just as high if validated in terms of one's entire law school career. The most disturbing revelation about the validity of the LSAT was contained in an article written to support the use of the examination. The measurement process by which each applicant's score is determined results in a score that is different from the "true score." The true score will be 30 points either way from the score determined by the measurement process. The writer explained it in these terms:

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[135] Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972).

[136] Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972).

[137] Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).

[138] Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

[139] Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972).

[140] *Id.* at 126-27.

[141] United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972).

[142] See 22 Buffalo L. Rev. 655 (1973) for another evaluation of the standard of review.

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[143] Consalus, *The Law School Admissions Test and the Minority Student,* 1970 U. Tol. L. Rev. 501 (1970).

[144] O'Neil, *supra* note 9, at 304.

[145] *The Interpretation of Law School Admissions Test Scores for Culturally Deprived and Non-White Candidates,* L.S.A.T. Annual Council Report of the Ad Hoc Committee of Student Background Factors (1966).

[146] Schrader & Pitcher, *The Interpretation of Law School Admission Test Scores for Culturally Deprived Candidates: An Extension of the 1966 Study Based on Five Additional Law Schools,* L.S.A.T. Annual Council Report (1972).

[147] F. Swineford, *Law School Admission Test: Comparison of Black Candidates and Chicano Candidates with White Candidates* (March 1972).

[148] Consalus, *supra* note 143, at 507. Mr. Consalus is the Program Director, Law School Admission Test, Educational Testing Service, Princeton, New Jersey.

> For example, an earned score of 500 (on a 200 to 800 scale) indicates that there are two chances out of three that the "true" score lies somewhere between 470 and 530. Or stated differently, there is *one chance in three* that the person's true ability as measured by the test, will actually fall *outside this range*.[152]

The article does not indicate how far outside this range that one score in three will fall. The quotation seems to indicate that it could fall almost anywhere on the scale from 200 to 800. Using a measurement process that results in one out of three scores being so far from the true score makes the test suspect regardless of whether there is any cultural bias. Another disturbing fact is that the correlation coefficient between the LSAT score and first-year law school grades is approximately 0.40.[153] This means that only about 16 percent of the variation in grades could be predicted or accounted for by the differences in scores on the LSAT.[154]

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[149] *Id.* at 509.

[150] Goolsby, *A Study of the Criteria For Legal Education and Admission to the Bar,* 20 J. LEGAL ED. 175 (1967).

[151] Schrader & Pitcher, *supra* note 146.

[152] Consalus, *supra* note 143, at 513 (emphasis added).

With these facts in mind one can measure the validity of the LSAT by applying the different standards of review that courts have used in testing cases. After a demonstration by black plaintiffs that the use of the LSAT eliminates more blacks than whites from consideration for law school admission, the burden of proof will switch to the defendants to demonstrate the relationship between performance on the test and performance in law school. If the most lenient standard, as applied in *Nansemond,* [155] is adopted by the court, the defendant will have to show that there is a "rational relationship" between the qualities tested and law school performance. If there were not such a high probability of error in the measurement process, the LSAT might withstand attack when the most lenient standard of review is applied. Since there is a possibility that one out of three true scores falls somewhere outside 30 points either way from the assigned score, a court would find it difficult to say that there was a rational relationship between the score received and one's ability to perform in law school. If the court hearing the attack on the LSAT applied the standard of review as was done in *Chance*[156] or *Armstead,*[157] the possibility of the test being upheld becomes more unlikely. Regardless of the error in the measure ment process, it is unlikely that the LSAT could measure up to the standard of *Cooper* which required a substantial relationship[158] or the standard of *Hobson* which was a hybrid version of the strict scrutiny standard.[159] Should the court require the strict scrutiny standard or a close facsimile as used in *Arrington,*[160] *Castro*[161] or

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[153] Goolsby, *supra* note 150, at 177.

[154] To interpret the correlation coefficient see W. Mehrens & J. Lehman, *supra* note 2, at 44-45.

[155] United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972).

[156] Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd,* 458 F.2d 1167 (2d Cir. 1972).

[157] Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972).

[158] Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

[159] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[160] Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969).

[161] Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

Baker,[162] there is no doubt that the Law School Admissions Test should be declared unconstitutional.

How would this conclusion be affected if the defendant could demonstrate that minority students performance is over predicted by the LSAT? Given the applicable rule of law and a test that eliminates more blacks than whites, it does not matter that the culturally advantaged are the ones who are actually discriminated against by the test. It does not change the conclusion of law even if the scores of the culturally deprived are over predictions of their actual performance and the scores of the individuals whose families are characterized by a high level of education are under predictions of their actual performance. The paradox is that the group most favorably treated in terms of actual performance in relation to predicted performance is probably the same group that has standing to object to the use of the test. This paradox would not exist, of course, if the score received on the test had a satisfactory correlation to the ability to perform in law school.

V. CONCLUSION

Because of the 1972 amendment to Title VII, some public employees will be able to proceed under the Equal Employment Opportunity Act as well as the 14th amendment.[163] From the viewpoint of the plaintiff, the law under the 14th amendment will be as favorable or better than the law under Title VII unless the court adopts the rational relationship standard. If strict scrutiny or the new standard that has been adopted by some courts is applied, the 14th amendment will definitely be more favorable to the plaintiff.[164]

Aside from the confusion caused by the application of different theories of review under the equal protection clause, there are several other problem areas that complicate the duties of a reviewing court. It has not yet been determined what disparity in the black-white ratio is sufficient to establish a prima facie case of discrimination and thereby shift the burden of proof to the defendant. It is also not clear what correlation between a test score and job performance is necessary to satisfy the rational relationship or strict scrutiny standard. The court must also determine which theories of validation are permissible to establish the required relationship. The court must determine if the discrimination can be characterized as racial in light of the fact that most courts have indicated that poor performance on standardized tests is a result of cultural or economic deprivation. If the group that is being discriminated against is a culturally deprived group, identification of it as racial is inaccurate. It is true that a disproportionate number of blacks will fall into the culturally deprived group, but this should not result in poor performance being equated with race. The group should not be identified by the color of their skin if the umbrella of equal protection is to be fairly applied to all culturally deprived individuals. If the test discriminates on the basis of cultural deprivation, the implementation of the existing rule of law based on race results in the culturally deprived white person who has done poorly on the standardized test being treated unequally.[165] This goes against the grain of the rationale of *Griggs* which held that "[t]he act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely what Congress has proscribed."[166]

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[162] Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).

[163] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[164] For a comparison of the standard of review under Title VII with the 14th amendment standard see *Testing, supra* note 6.

The application of any of the equal protection standards will result in a re-evaluation of many of the traditional criteria required for employment and education. The result should be the nullification of invalid standards that have a racial impact. A suit has recently been filed against the Virginia Board of Bar Examiners to determine the validity of the requirement that a graduate of an accredited law school must still pass the bar exam,[167] and a review of the Pennsylvania Bar Exam resulted with the conclusion that it was unconstitutional.[168] It has also been suggested that the requirements of a master's degree for applicants for a teaching position is an impermissible standard.[169] The limits of the application of this standard of equal protection have not yet been defined. It is ripe for Supreme Court adjudication.[170]

Claude F. Clayton, Jr.

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[165] It has been successfully argued that preferential treatment for blacks is not a violation of the equal protection clause. DeFunis v. Odegaard, 507 P.2d 1169 (Wash. 1973).

[166] Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

[167] Lee v. Kuykendall, Civil No. 505-72-R (D. Va., filed Oct. 5, 1972).

[168] Reinstein, *Evaluating Bar Admission Procedures Under Standards of Equal Protection,* 44 TEMP. L.Q. 248 (1971).

[169] 22 BUFFALO L. REV. 655 (1973).

[170] Even though I.Q. tests have come under attack, one was recently used by a court to determine that parents were unfit to raise their children. *In re* McDonald, 201 N.W.2d 447 (Iowa 1972).

BRANDED: ARREST RECORDS OF THE UNCONVICTED

I. Introduction

Each year, as thousands of individuals throughout Mississippi and the nation are arrested, fingerprinted, and photographed by various local, state and federal officers, the number of dossiers maintained by these agencies grows at an astounding rate. With the recent advent of computer technology, the capacity of law enforcement agencies to maintain informational files on individuals has increased tremendously. With this increased capacity to store vast amounts of material has come the question of the right of an arrested individual to have fingerprints,[1] photographs, or other recorded information, released, sealed, or expunged, upon his acquittal or release without having been brought to trial.[2] These rights, if indeed they exist, must be weighed against the need for law enforcement officials to maintain adequate records for investigative and indentification purposes.[3]

This comment will explore individual rights of privacy as constitutionally guaranteed[4] and as balanced against the public necessity for retention of arrest-record data.[5]

II. Scope of Recording Capabilities

Considering the vast capabilities of modern technology, it is not inconceivable that one who has been arrested will have his arrest data on file in several different computerized terminal points, including local and state centers, and often in regional and national centers as well. The largest of these is the facility maintained by the F.B.I., under the control of the Identification Division. The Division, formed in 1924, is utilized by practically every law enforcement agency in the nation, as as well as by the nationally chartered banks, insurance companies, and federal agencies.[6] The Division has over 200 million sets of fingerprints on file in its criminal identification files and its applicant files, both of which are maintained independently.[7] The F.B.I. receives and disseminates these fingerprints on a reciprocal agreement basis, whereby local law enforcement agencies may forward prints of one arrested and, in turn, receive data from the F.B.I. on the individual's past criminal background. The F.B.I. retains a duplicate of the prints and adds the accompanying information surrounding the arrest to its criminal file, which includes data on over 60 million arrests of over 19 million individuals. In 1971, the Identification Division employed approximately 3,300 persons, and received almost 29,000 fingerprints each day, of which around 13,000 prints were processed into the criminal files associated with arrests records.[8] The F.B.I. disseminates information to almost any local or state official who has even a remote connection with law enforcement or to one who is authorized by some legislative enactment or rule to process fingerprints of applicants for employment, licenses, or permits.[9] Although the F.B.I. requires that a legitimate purpose for the data must exist before the information is released, the Bureau has little control over the uses to which the records are actually put once the data is disseminated. The Division does not have the manpower necessary to monitor improper uses once the data is passed on to other agencies, and thus takes action only when a complaint as to improper use is received, such as where a local police department passes the data to a private employer. Appropriate action is then taken, including restrictions on the local department or changes in administrative procedures at the local level.[10] If the local agency should request return of any information or data which it has placed on file with the Division, the Bureau's policy is to return all of the data, and to retain no duplicates of the prints so submitted. In 1970, more than 8,000 arrest records were returned to local agencies upon request.[11]

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[1] Annot., 41 A.L.R.3d 732, 733 (1972). Dactylography, the scientific study of fingerprinting for identification purposes, and dactyloscopy, the practical application of fingerprints as a science, have each been instituted as an integral portion of our legal system. Modern methods of fingerprinting have proved more reliable and precise than the previous method of identification utilized, known as the Bertillion System, which recorded body measurements. As of this writing, no two sets of fingerprints have yet been found to be identical. *Id.*

[2] The term "arrest record" will be used herein to refer to the records of one arrested, but not subsequently convicted of a crime, unless otherwise noted in the text or footnotes.

[3] For these restrictions *see, e.g.,* State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), *aff'd,* 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed,* 333 U.S. 834 (1948), for limitations on photographs or other data being placed in public "rogue's galleries."

[4] *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973), citing cases construing the right to privacy under U.S. Const. amend. I, IV, V, IX and XIV.

[5] *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 497-98 (Goldberg, J., concurring), stating that where "fundamental" rights are involved, the State must show a compelling interest, and not merely a rational relation to a proper state purpose, in order to overcome the right of the individual. *But see id.* at 508 (Black, J., dissenting). *See also* Emerson, *Nine Justices in Search of a Doctrine,* 64 Mich. L. Rev. 219, 230 (1965).

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[6] By order of the Attorney General, insurance companies are provided data for identification purposes but are not given criminal-arrest data. Virtually all applicants for federal employment have an F.B.I. record check made under Exec. Order No. 10450, 3 C.F.R. 936 (Supp. 1965), 5 U.S.C. § 7311 (1970), before they are employed by a federal agency.

[7] *See* Menard v. Mitchell, 328 F. Supp. 718, 721 (D.D.C. 1971).

[8] *Id.*

[9] *See* Annot., 46 A.L.R.3d 901, 905 (1972).

[10] Menard v. Mitchell, 328 F. Supp. 718, 722 (D.D.C. 1971).

Since its inception in 1924, the F.B.I. Identification Division has processed and retained all legible arrest fingerprints and other arrest data submitted by local agencies on virtually all arrests, regardless of the nature of the crime allegedly committed. In April 1967, procedures were adopted to screen all incoming arrest fingerprints and to segregate those which dealt with minor arrests, including drunkenness, disorderly conduct, vagrancy, traffic offenses, trespassing, and criminal registration. Arrest records submitted which fell into these categories were to be handled on a "no answer necessary" basis, unless the contributor specifically requested a reply in response to the check on the prints submitted, or unless F.B.I. records indicated that the person was a fugitive.[12]

This policy has now been further refined in order to achieve uniformity in arrest data stored at the national level and to streamline the efficiency of the manual identification system. The new policy guidelines, approved by Attorney General Richard G. Kleindienst on February 9, 1973, stipulate that:

> (1) Fingerprints should not be submitted to the F.B.I. Identification Division in connection with nonserious offenses as set forth in the National Crime Information Center/Computerized Criminal History (NCIC/CCH) policy statement, unless there is a question of identity or a check of Identification Division files is considered necessary for current investigative purposes.
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> (2) Fingerprint cards submitted on nonserious offenses as provided above will be searched through Identification Division files and returned to the contributor with the results of the search.
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> (3) Nonserious offenses appearing on fingerprint cards returned to contributors will not be recorded on identification records.
>
> (4) Every identification record furnished in connection with this program will bear an F.B.I. number. (Those fingerprint cards not identified with a prior record in [the] F.B.I. files and returned to the contributor will not be assigned an F.B.I. number.)

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[11] *Id.*

[12] Form letter from L. Patrick Gray, III, Acting Director of the F.B.I., to any agency or person contributing fingerprints, February 9, 1973.

(5) A notation concerning the reason for the submission of nonserious offenses should appear in the additional information block on the back of the fingerprint card.[13]

The effect of these enumerated guidelines cannot be ascertained at this time. However, if the spirit of the new policy is fully realized, this may be a step forward in protecting the individual, at least in cases of nonserious or minor charges, against the adverse effects of dissemination of his arrest record.

Nevertheless, an individual who has been arrested for a more serious crime still has no viable means of preventing the dissemination of his arrest record, either through the facilities of the NCIC or on a local or state basis, other than by court order[14] or state statute.[15]

III. State Statutory Approaches

Several states, including California, Connecticut, Illinois, and New York, have enacted specific statutes providing for the sealing or expunction of arrest records upon the acquittal or release of an individual without conviction.

California. The California statute is perhaps the most far-reaching of the legislative enactments in this area.[16] This statute provides that a *convicted* felon who satisfactorily fulfills a prescribed probationary term may petition the court to set aside his plea of guilty or nolo contendere or a verdict of guilty, and to release the petitioner from the penalties and disabilities which result from his felony conviction. If the felon is subsequently charged with a crime, though, the removal of the disability does not prevent the prior conviction from being introduced and proven. As construed by the California courts, expunction of a criminal-felony record is an incentive or reward for good behavior. In a subsequent trial for a separate offense, expunction does not hide the fact that the defendant has been previously convicted of a felony.[17] Indeed, the record may be reinstated. The California statute does not, however, apply to one who was arrested but not convicted, although the relief is available to one convicted of a misdemeanor if he has not been given a probationary sentence and has successfully served his jail sentence and exhibited a rehabilitated disposition of character.[18] California has also provided that a juvenile under the age of 18 at the time of the alleged commission of a misdemeanor may petition the court for an order sealing the records of detention or arrest records if the charges were dropped or the defendant acquitted. If the court grants the relief, the arrest or detention proceeding is deemed not to have occurred and the petitioner may answer any question as to a previous arrest or detention in the negative.[19] The California courts have held, on the basis of equal protection, that the sealing provisions should be applied to a juvenile who has been detained but not formally charged with the commission of a felony, stating that no rational state interest justifies granting relief only to a juvenile who was actually charged in connection with a crime.[20] Under this reasoning it is conceivable that the sealing or expunction provisions of the California statute could be extended by the California courts to adults who have been arrested but not convicted of a crime.[21]

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[13] *Id.* The F.B.I.'s National Crime Information Center (NCIC), which serves as a central clearinghouse for law enforcement agencies throughout the nation, was established under recommendations made by the Presidential Commission on Crime in 1967. The NCIC Advisory Policy Board calls for at least one criminal fingerprint card to be in the files of the F.B.I. Identification Division to support the computerized criminal record in the national index. The Advisory Board further requires that data with respect to current arrests entered in the national index "be restricted to serious and/or significant violations," and sets forth "as excluded from the national index . . . juvenile offenders as defined by state law (unless the juvenile is tried in court as an adult)," charges relating to drunkenness, vagrancy and public order violations such as disturbing the peace, and traffic violations other than those involving manslaughter, D.U.I. or hit and run. Other nonserious offenses included in the Advisory Board's statement, as related by Mr. Gray, include gambling offenses specified as "cardgame playing," and liquor law violations where a minor has merely misrepresented his age. *See also National Crime Information Center,* 5 Law and Computer Technology 88 (1972) (reprinted from F.B.I. Law Enforcement Bull., Feb. 27, 1972).

[14] *See, e.g.,* Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1968); Menard v. Mitchell, 328 F. Supp. 718, 721 (D.D.C. 1971); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). *Contra,* United States v. Kelly, 55 F.2d 67 (2d Cir. 1932).

[15] *See, e.g.,* United States v. Rosen, 343 F. Supp. 804 (S.D.N.Y. 1972). *See also* Purdy v. Mulkey, 228 So. 2d 132 (Fla. Ct. App. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970); *In re* Foster, 72 Misc. 2d 1029, 340 N.Y.S.2d 758 (Erie County Ct. 1973).

[16] Cal. Penal Code § 1203.4 (West Supp. 1973).

Connecticut. Connecticut has provided by statute[22] that when a defendant is acquitted by a final judgment, or when the charge is dismissed, the records of the state's attorney or prosecuting attorney shall be automatically erased. Whenever a charge has been terminated by *nolle*

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[17] Meyer v. Superior Court, 247 Cal. App. 2d 133, 55 Cal. Rptr. 350 (Ct. App. 1966).

[18] CAL. PENAL CODE § 1203.4a (West Supp. 1973).

[19] CAL. PENAL CODE § 1203.45 (West Supp. 1973).

[20] McMahon v. Municipal Court, 6 Cal. App. 3rd 194, 85 Cal. Rptr. 782 (Ct. App. 1970). *Cf.* T.N.G. v. Superior Court, 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971).

[21] *See, e.g.,* Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971).

[22] CONN. GEN. STAT. ANN. § 54–90 (Supp. 1973).

prosequi[23] or continued for a period of 1 year, or when an absolute pardon is granted, the individual or his heirs may file a petition to have all police and court records erased. The effect of the erasure is that the defendant is deemed not to have been arrested *ab initio* within the general meaning of the statutes with respect to the proceedings so erased.[24] The Connecticut approach offers the advantage of automatic erasure of records under certain circumstances, and provides that in those cases in which the arrestee must petition the court for relief no fee will be assessed the individual.[25] Additionally, the clerk of any court who has information pertaining to a charge erased under the statute is forbidden from disclosing this information to anyone. Although this method seems to offer protection to the privacy of the individual, if rumor of an individual's past criminal activities should be leaked to employers by organizations such as "clipping agencies," no viable method would exist for the individual to effectively show the circumstances surrounding the arrest, since all records would have been destroyed or erased. Additionally, under the Connecticut statute, there is no express direction to the state police or local agencies to retrieve the arrest data from the F.B.I. or from any other source to which the data was disseminated. A literal reading of the statute, however, would seem to indicate that the spirit of the statute would encompass these sources.

Illinois. Illinois has enacted a statute[26] providing that an arrestee who has not been previously convicted of any criminal offense or violation of a municipal ordinance may petition the chief judge of the circuit wherein the charge was brought to expunge the arrest from the records of the arresting authority, if the individual is acquitted or released without being convicted.[27] The Illinois Department of Law Enforcement is specifically directed to return fingerprints, photographs or other arrest data to the individual upon his acquittal of the charge, or upon his release without conviction. The statute makes no mention of whether the Department of Law Enforcement is required to retrieve arrest data forwarded to another agency, such as the F.B.I. Criminal Division, and the Illinois courts have not yet spoken to this issue. However, if the Illinois court should interpret the recent amendments to the statute as narrowly as Illinois lower courts have construed statutes relating to expunction at the local level, the potential protections offered to an individual who has been acquitted or never brought to trial may be diminished by allowing local police departments to retain identification records taken at the time of arrest as a matter of public policy.[28]

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[23] *See* Hing Wan Wong v. Liquor Control Comm'n, 160 Conn. 1, 273 A.2d 709 (1970), *cert. denied,* 401 U.S. 938 (1970), holding that a *nolle prosequi* ended only the particular proceeding and did not bar subsequent proceedings for the same offense.

[24] CONN. GEN. STAT. ANN. § 54–90(e) (Supp. 1973).

[25] *Id.*

[26] ILL. ANN. STAT. ch. 38, § 206–5 (Smith-Hurd Supp. 1973).

[27] A literal reading of the statute would indicate that a court of competent jurisdiction possesses the power to order the return of data from local authorities. *But see* Homewood v. Dauber, 85 Ill. App. 2d 127, 229 N.E.2d 304 (1967); *cf.* Chicago v. Mayers, 68 Ill. App. 2d 442, 216 N.E.2d 298 (1966). *See also* People v. Lewerenz, 42 Ill. App. 2d 140, 192 N.E.2d 401 (1963).

New York. New York has enacted legislation which guarantees the return of identification data to one acquitted in a criminal proceeding, unless another criminal action is pending against him, or unless the individual has been previously convicted of a crime, including disorderly conduct and vagrancy. The identification record must be returned to the individual by any police officer who has control or possession of the data, upon the demand of the individual.[29] The New York Act does not require extensive judicial proceedings, but merely that the individual make demand of any one officer or department who holds the relevant data. However, with the advent of sophisticated computer networks, the individual may be faced with a time-consuming and expensive task in ascertaining to whom the data has been disseminated. The statute also provides that an officer who refuses to yield the data shall be guilty of a misdemeanor,[30] but no mechanism is provided for compelling agencies outside New York, such as the F.B.I., to return the data; additionally, there is no provision requiring a New York agency to demand the return of the records from the F.B.I. or other agencies.

The New York statute, as interpreted, does not require identifying data to be returned to one who is charged with a felony but subsequently adjudged to be a juvenile offender, although the identifying data must be retained as confidential material in the Department of Corrections files.[31]

IV. Judicial Interpretation

Pennsylvania has no specific statute dealing with the return, sealing or expunction of arrest data when one is acquitted or released without charges being filed. However, a Pennsylvania lower court has recently held that under some circumstances, a limited expunction of fingerprints may be ordered.[32] Although the Pennsylvania court held that the question of expunction was generally a legislative matter,[33] the court did make some inroads as to a charge which could greatly affect the defendant's social and economic well-being—adultery. By allowing the destruction of fingerprint records in the possession of the chief of county detectives, which were held under a Pennsylvania statute,[34] the court allowed some relief. However, the court held that in the absence of express statutory authority, it had no jurisdictional power to order local or state police or the F.B.I. to expunge the arrest data from their files, even though the arrestee might have been acquitted or the criminal charges dismissed, for the statute specifically charges the state police with maintaining a comprehensive system of criminal identification and disseminating this data to police or to courts when necessary in furthering law enforcement goals. Additionally, the court further limited the expunction granted by ordering only fingerprint records to be destroyed, and allowing other records in possession of the chief of county detectives to be maintained.

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[28] *See* cases cited note 27 *supra.*

[29] N.Y. Civ. Rights Law § 79-e (McKinney Supp. 1973).

[30] *Id.*

[31] People v. Havern, 43 Misc. 2d 430, 251 N.Y.S.2d 350 (Wash. County Ct. 1964).

Judicial interpretation of legislative intent and the construction of statutes, such as was done in Pennsylvania, comprises much of the relief available to individuals in the expunction of arrest records. In the absence of legislative relief, some courts have granted full or partial expunction of records by strictly construing general retention statutes to permit retention only of arrest records of those who are subsequently convicted;[35] others have granted relief on equitable provisions;[36] and still others have denied relief altogether.[37]

The Supreme Court has held that the penumbra of the first amendment guarantees the right of privacy against intrusion by the government.[38] However, the Court has not fully extended this penumbra to include an absolute right to have one's arrest record expunged or sealed automatically upon acquittal or dismissal of charges.[39] In *Menard v. Mitchell*,[40] the Court of Appeals for the District of Columbia spoke to the broad issue of arrest records. There, the appellant brought an action to compel the F.B.I. to return fingerprints and other arrest data forwarded to the Bureau by California officials, following a 2-day detention of the appellant, from which he was released without a judicial proceeding. The appellant contended that the United States officers had no knowledge of any violation by the appellant, and that the possibility of adverse effects of retention of the records by the F.B.I., including the effect of dissemination of the data, outweighed any justification for the retention of his fingerprints or other data in the Bureau's criminal identification files.[41] The court, in essence, delineated four types of arrests which may be made, in which expunction may be proper: (1) those not based on probable cause and not made with good faith;[42] (2) those made without probable cause but with good faith intentions;[43] (3) those made with probable cause, but where the officials may have knowledge that further investigation may exonerate the individual;[44] and, (4) those made with probable cause but where judicial proceedings are not utilized.[45]

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[32] Commonwealth v. Magaziner, 50 Pa. D. & C.2d 291 (C.P. Chester County 1970).

[33] *Id.*

[34] PA. STAT. ANN. tit. 19, § 1405 (c) (Supp. 1973).

[35] Commonwealth v. Magaziner, 50 Pa. D. & C.2d 291 (C.P. Chester County 1970).

[36] *See, e.g.,* Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906).

[37] *See, e.g.,* Purdy v. Mulkey, 228 So. 2d 132 (Dist. Ct. App. Fla. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970).

[38] Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Loving v. Virginia, 388 U.S. 1 (1967).

[39] *See, e.g.,* United States v. Kelly, 55 F.2d 67 (2d Cir. 1932).

[40] 430 F.2d 486 (D.C. Cir. 1970).

The court, in *Menard,* set forth general principles to be followed in cases involving the right of law enforcement agencies to maintain arrest data under the four basic arrest circumstances outlined above. The court noted that the "[u]se of the power of arrest in order to inflict summary punishment is, of course, unconstitutional,"[46] as a violation of due process by the utilization of nonjudicial punishment. The court, in effect, also reasoned, under the doctrine of the "fruit of the poisonous tree,"[47] that there is considerable doubt as to whether data or physical objects[48] gleaned from an illegal arrest may be utilized in any manner.[49] The question, therefore, is whether a record of an unconstitutional arrest made without probable cause is a "fruit" of that arrest, and thus subject to the exclusionary rule.[50] The logic behind the denial of the right to retain data concerning an arrest made without probable cause is that the police will be thereby discouraged from making other illegal arrests.[51]

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 491; *cf.* Davis v. Mississippi, 394 U.S. 721 (1969).

[44] 430 F.2d at 491.

[45] *Id.* at 495.

[46] *Id.* at 494; *see, e.g.,* United States v. Price, 383 U.S. 787 (1966). See also the fact situations involving harrassment arrests presented by Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969) and Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

[47] *See, e.g.,* Davis v. Mississippi, 394 U.S. 721 (1969); Elkins v. United States, 364 U.S. 206 (1960); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[48] Presumably data and physical objects could include such things as photographs.

[49] Menard v. Mitchell, 430 F.2d 486, 491 (D.C. Cir. 1970).

[50] *See, e.g.,* Wong Sun v. United States, 381 U.S. 471 (1963).

On remand to the district court,[52] the California[53] and United States[54] code provisions were examined to determine if the F.B.I. had the authority to retain the arrest records under its statutory authorization.[55] The district court then examined the appellant's claims that in the absence of conviction, the retention and use of the arrest data violated his constitutional rights—the presumption of innocence, the right to privacy and the fourth amendment guarantee against unreasonable searches.[56] The district court, relying on a line of decisions involving exigent circumstances and equity rulings,[57] found that expunction of arrest records is not an absolute matter of right. However, the court did find that individual privacy must be protected, and that a considerable burden is placed upon the government in cases involving the assembling and retention of information which may infringe upon one's privacy.[58] The most immediate danger to privacy, noted the court, lies in the fact that the record may be subject to dissemination, which unmasks incidents of dubious relevance in an individual's past, and which should not be allowed absent a compelling governmental interest.[59] The definition of what constitutes this compelling interest was generally deemed to be a matter for legislative determination, and consequently the court reasoned that the federal statute dealing with maintenance of identification records[60] should be strictly construed as to its dissemination aspects, including the release of material to any local or state agency seeking employment or licensing checks.[61] The court clearly indicated that the statute[62] permitted only dissemination between federal and local authorities in regard to the administration of criminal justice.[63] The court concluded that if the statute were thus narrowly construed and limited, there would be a compelling interest to provide state or local law officers with data which may aid in carrying out law enforcement objectives.[64]

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[51] *Cf.* United States v. Rosen, 343 F. Supp. 804 (S.D.N.Y. 1972).

[52] 328 F. Supp. 718 (D.D.C. 1971).

[53] Cal. Penal Code § 849 (West 1970).

[54] 28 U.S.C. § 534 (1970).

[55] The district court found that the state authorities had not filed charges against the appellant, but had made an arrest without a warrant, pursuant to Cal. Penal Code § 849 (b) (1), with a notation made on the appellant's record that there was a "detention" only. The district court concluded that probable cause was not at issue and that an arrest was actually made, although it was referred to as a detention; and that therefore the record could be maintained by the F.B.I. under its authorization to retain criminal identification records.

[56] Menard v. Mitchell, 328 F. Supp. 718, 724 (D.D.C. 1971).

[57] *See, e.g.,* Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1968); Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

[58] Menard v. Mitchell, 328 F. Supp. 718, 726 (D.D.C. 1971). Thus the court emphasized the need for a balancing between governmental interests and individual rights and pointed out the necessity for curbing the power of the government in this area.

[59] *Id.*

[60] 28 U.S.C. § 534 (1970).

Menard is indicative of an emerging line of decisions which tend to place restraints upon the use or dissemination of arrest records under certain circumstances. Often, the decisions granting full or partial relief are based upon equitable considerations[65] or extraordinary circumstances, and are made after careful consideration to determine whether the public interest in maintenance of the data is obviously outweighed by the resulting harm to the individual.[66]

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[61] Menard v. Mitchell, 328 F. Supp. 718, 726 (D.D.C. 1971).

[62] 28 U.S.C. § 534 (1970).

[63] *See generally* 72 CONG. REC. 1989 (1930) for the legislative history of the statute.

[64] The purposes might include investigation of possible criminal violations, the use of plea bargaining as a factor in determining the amount of bail, and in the setting of sentences or an aid in the functioning of correctional facilities. These uses are subject to scrutiny by the courts as to the satisfaction of due process requirements in the criminal area. However, when the information is disseminated for non-law enforcement purposes (i.e. employment, licensing, etc.), the individual often is unaware of the use of the material and may not have judicial recourse. Thus, where the data is disseminated to local or state officials for legitimate law enforcement purposes, expunction is not proper. The information may be disseminated within the Federal Government, however, under Exec. Order No. 10450, 3 C.F.R. 936 (Supp. 1965), 5 U.S.C. § 7311 (1970), which provides for checks on prospective government employees, in the interest of national security. The information so supplied may not be given to private individuals or to government contractors, and there are protections against misuse of the information. *See* Menard v. Mitchell, 328 F. Supp. 718. 727 (D.D.C. 1971).

[65] *Cf.* Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1968). There the court allowed a lower court to take ancillary jurisdiction to consider whether an order restricting the dissemination of an arrest record to any agency, whether for law enforcement or for non-enforcement related purposes, is proper, when the original charges have been dismissed. The court thus utilized a flexible case-by-case approach to determine whether proper law enforcement purposes are served by retention and dissemination, and was among the first courts to allow ancillary jurisdiction to be taken in the area of expunction cases.

[66] *Cf.* Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971), which allows a court under "appropriate circumstances," to order federal agencies to expunge arrest records.

An increasing number of state decisions have also recognized the right of an individual to receive judicial relief in the form of expunction or restrictions on the dissemination of arrest data.[67] But even though one may logically conclude that an acquittal, a dismissal of charges, or a failure to bring charges should safeguard the individual from the threat of dissemination of an arrest record, judicial relief is not always appropriate. The public interest will again be considered to determine whether arrest data may be maintained although the arrest did not culminate in conviction. Under this practice an acquittal is not deemed necessarily as an adjudgment of innocence, but rather as a failure to prove guilt beyond a reasonable doubt.[68]

Where the defendant is subsequently acquitted, an equitable guarantee of privacy to prevent the improper dissemination of the information contained in the arrest record may be inferred by some decisions, but thus far, the cases have not expressly created such a right as a constitutional guarantee.[69] Since *Griswold v. Connecticut,*[70] it may be concluded that a constitutionally-protected right of privacy does exist. The courts, however, are still grappling with the problem of determining the breadth of this right.[71] Once one has been acquitted of a crime, the burden necessarily should shift to the government to show the need for the maintenance of the arrest data. This need must then be balanced against the rights of the individual.[72] The "fundamental" rights of the individual should prevail over all but a "compelling" governmental interest. An interest which is only "rational" in its relation to governmental functions should yield to individual rights of privacy.[73] For the protection of a right to privacy that is deemed "fundamental" under the Constitution, the "compelling interest" requirement should not be an excessive burden to place upon law enforcement agencies.[74] This argument becomes particularly cogent when one considers the irreparably harmful consequences to the individual who, though exonerated of wrongdoing, is faced with the possibility of dissemination of his arrest record.[75] However, some courts have based a refusal to expunge or restrict dissemination after acquittal on the ground that the acquittal or a successful action for false imprisonment is a matter of public record, and thus the harm from the maintenance or dissemination of the arrest data is effectively negated by this public fact.[76] Although theoretically appealing, this logic is faulty in the light of common experience. Often, notations as to dispositons of cases are not properly recorded. Even where accurate records are maintained, the data may be disseminated in an area far from the jurisdiction in which the record of exoneration exists. Additionally, the individual may not be aware of the dissemination and therefore unable to refute any misconceptions surrounding the data.

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[67] *See, e.g.,* Davidson v. Dill, 503 P.2d 157 (Colo. 1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

[68] *See generally* Comment, *Retention and Dissemination of Arrest Records: Judicial Response,* 38 U. Chi. L. Rev. 850, 857 (1971).

[69] *See generally* Prosser, *Privacy,* 48 Calif. L. Rev. 383, 399 (1960), which concludes that a tort action may be maintained when one's name, fingerprints, photographs, etc., are disseminated in a public "rogue's gallery" of persons convicted of crime, when in fact the individual has not been convicted of a crime, although officers do have the right originally to make such a record at the time of arrest and use the data for legitimate law enforcement purposes before the trial. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965); *cf.* Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971).

[70] 381 U.S. 479 (1965).

[71] *See, e.g.,* Purdy v. Mulkey, 228 So. 2d 132 (Dist. Ct. App. Fla. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

[72] *See, e.g.,* Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

[73] *Id.* at 217.

Several states have held that in the absence of express statutory authority, an individual with an arrest record has absolutely no right to have his record expunged at any level or its dissemination among law enforcement agencies restricted.[77] The Florida Supreme Court, in *Purdy v. Mulkey,* flatly refused to expunge or seal the record of an individual in the absence of a statute to this effect.[78] The court noted that the legislature had acted upon portions of the Florida criminal and probationary statutes[79] in recent years, and had failed to deal with the sealing, expunction, or restriction of dissemination of arrest records. The court concluded that since the sheriff had a *duty* under the Florida law to take fingerprints when he felt this action was in the public interest, this same public interest overrides any inconvenience to the petitioner. The retention of judicial review in cases of "overriding equitable considerations" was limited to those exceptional cases in which it is clear that the sheriff has abused his discretionary powers under Florida law as to the taking of fingerprints or photographs.[80] The fact that the petitioner in *Purdy* had actually pled guilty to the charge, although there was never an adjudication of guilt, carried great weight in this case and overrode any equitable considerations which may have otherwise been considered. Further, no showing was made of clear abuse of discretion on the part of the sheriff.

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[74] *Id.* at 218.

[75] *See* Purdy v. Mulkey, 228 So. 2d 132 (Dist. Ct. App. Fla. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970).

[76] *See* Annot., 46 A.L.R.3d 900, 904 (1972).

[77] *See, e.g.,* Walker v. Lamb, 254 A.2d 265, 266 (Del. Ch. 1969), *aff'd,* 259 A.2d 663 (Del. 1969), where the court held that historically the benefit to the public provided by the retention of identification records of one accused of crime, even if subsequently not convicted, outweighs any humiliation to the individual, and there is no violation of privacy inasmuch as the photographing or fingerprinting merely creates images of the individual's physical characteristics; Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61 (App. Div. 1947), holding that where one pled guilty to a traffic violation, he could not later seek to have records expunged merely because the violation might be weighed against him when seeking bar admission, particularly since applicants to the New Jersey bar must routinely submit fingerprints; Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (1944), holding that police have discretion in returning fingerprints to one who is charged with but not convicted of crime; *cf.* Kolb v. O'Conner, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957). *See also* State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), *aff'd,* 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed,* 333 U.S. 834 (1948), *rehearing denied,* 333 U.S. 858 (1948). *But see In re* Fortenback, 119 N.J. Super. 124, 290 A.2d 315 (L. Div. 1972), holding that where one meets the burden of showing great economic or psychological harm, expunction of arrest records may be granted, although each case must be viewed in light of its particular fact situation.

Even if state court judges did consistently order the identification data in the files of law enforcement agencies sealed or expunged, the court records indicating the original disposition of the case would still be a matter of public record unless the petitioner also could convince the court that it should, by the invocation of its equitable powers, seal these records because the individual's rights outweighed the public interest involved in the maintenance of the record for valid law enforcement purposes.[81]

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[78] 228 So. 2d 132 (Dist. Ct. App. Fla. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970). The petitioner was charged with the crime of attempt to commit petit larceny, a misdemeanor; he was fingerprinted and photographed pursuant to FLA. STAT. ANN. § 30.31 (1969), which provides that a sheriff has the discretion of making such photographs and fingerprints when one is arrested for or convicted of a criminal offense, if the sheriff feels that this procedure is necessary to the protection of the public; additionally, the sheriff is required to forward a copy of all fingerprints to the F.B.I. and the State Bureau of Law Enforcement. The petitioner pled guilty to the misdemeanor and was placed on a probationary sentence, after which he completed high school, earned college credits and served in the armed forces. Eight years after the arrest, he was denied employment solely on the basis of his criminal record.

[79] FLA. STAT. ANN. § 30.31 (1969); FLA. STAT. ANN. § 940.01 (1972), dealing with probationary sentences.

[80] FLA. STAT. ANN. § 30.31 (1969).

[81] Purdy v. Mulkey, 228 So. 2d 132, 138 (Dist. Ct. App. Fla. 1969), *aff'd,* 234 So. 2d 108 (Fla. 1970); *cf.* State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), *aff'd,* 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed,* 333 U.S. 834 (1948), *rehearing denied,* 333 U.S. 858 (1948). *Contra, In re* Foster, 72 Misc. 2d 1029, 340 N.Y.S.2d 758 (Erie County Ct. 1973). In Mulkey v. Purdy, 234 So. 2d 108, 111 (Fla. 1970) (Ervin, C.J., dissenting), the chief justice maintained that under the circumstances, where irreparable personal injury was alleged through the maintenance

V. THE CURRENT MISSISSIPPI POSITION

The question of whether one with an arrest record but without conviction may have his record expunged or sealed or the dissemination thereof restricted seems to be one of first impression in Mississippi jurisprudence. The Mississippi statute regarding the fingerprinting and photographing of an individual charged with crime[82] provides that the power and duty of taking fingerprints and, if necessary, photographs of every person arrested for crime within the State is conferred and *imposed* upon any officer or agency charged with law enforcement within the State. The statute additionally provides that copies of the fingerprints and photographs obtained by other agencies and by the sheriffs and municipal officers must be sent to the Identification Division of the Department of Public Safety where a central file is maintained and is available to all interested law enforcement agencies.

The Identification Bureau of the Department of Public Safety maintains extensive files containing fingerprints, photographs, and records of "known" criminals living in Mississippi or those persons convicted in Mississippi.[83] The records maintained by the Bureau are indexed and cross-filed for future reference, and currently contain over 235,000 fingerprints.[84]

In the absence of specific judicial or legislative guidelines as to a uniform procedure for the handling of fingerprinting and the collecting of other data at the time of arrest, Mississippi police departments generally follow internally designed procedures which are adapted to the individual departments' operations. The procedures followed by the Gulfport[85] and Jackson[86] police departments delineate the method fol-

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of a "rogue's gallery," that the general law of equity is not so impotent as to deny relief absolutely in every situation solely because there is no express statutory authority. In the opinion of the chief justice, FLA. STAT. ANN. § 30.31 (1969) does not provide for photographing an arrested individual, nor does the statute either expressly or impliedly provide that the fingerprints taken in accordance therewith should be made permanent records in any law enforcement system.

[82] MISS. CODE ANN. § 99—15—13 (1972).

[83] Material submitted by the Mississippi Department of Public Safety to William L. Shappley, Jr., July 16, 1973.

[84] *Id.*

[85] Letter from Craig M. Monroe, Jr., Chief of Police, Gulfport, Mississippi, to William L. Shappley, Jr., July 24, 1973. Procedure utilized by the Gulfport Police Department in regard to arrests:

(1) Comprehensive arrest report filed by arresting officer is compiled, containing: (a) Name; (b) Age and date of birth; (c) Color of hair, eyes, weight, height, scars and marks; (d) Social Security number; (e) Occupation; (f) Place of birth; and (g) Charge and date of arrest; name of arresting officer and place of arrest.

lowed in two of the State's urban areas in compiling data on individuals who have been arrested.

Although the Mississippi Supreme Court has affirmed the individual's right to privacy in *Martin v. Dorton*,[87] where the court recognized an action based upon a private citizen's right of privacy in tort, there is no case law in the State setting forth guidelines in regard to the necessary elements of the action.[88]

A valid public interest may exist in the taking of arrest data, but the rights of the individual need not be abandoned.[89] The retention of records in the "public interest" is based on the need to ascertain the past activity of all arrested individuals; the need to exhibit data to vic-

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(2) An offense report or investigative report is filed, dealing with the facts gathered by investigating officer directly.

(3) All felony cases are photographed and fingerprinted.

(4) No information is released to business establishments on persons charged with any criminal offense, unless a release is signed by the person about whom the inquiry is being made.

(5) Information is released on persons with arrest records to other law enforcement agencies.

(6) The F.B.I. is directed to withdraw fingerprint cards submitted by the Gulfport Police Department on individuals who do not go to trial for lack of evidence.

(7) Any and all records made in connection with arrests are maintained in the Department's files, regardless of the outcome of court proceedings or preliminary hearings. These records are for departmental use only and are not released to any agency.

(8) All juvenile files are maintained separately from adult files and are not released unless directed by the Harrison County Family Court.

(9) A complete summary of all felony cases is made and given to the district attorney's office upon completion of the police investigation of the case.

[86] Letter of Lavell Tullos, Chief of Police, Jackson, Mississippi, to William L. Shappley, Jr., July 18, 1973. The policy of the Jackson Police Department is to fingerprint, photograph, and type an identification record on each individual arrested by the Department. Fingerprints of each individual arrested are forwarded to the Identification Bureau of the Department of Public Safety, and, in the case of an individual arrested on a narcotics charge, a copy of the fingerprints is forwarded to the State Narcotic Bureau. As of February 9, 1973, fingerprints were forwarded to the F.B.I. only on those individuals charged with a serious crime. *See* note 13 *supra*. The Jackson Police Department does not return fingerprints or records to an individual not subsequently convicted, unless a court order to that effect is issued.

[87] 210 Miss. 668, 672, 50 So. 2d 391, 393 (1951); *see* Prosser, *supra* note 69, at 387 n. 32.

[88] *Cf.* Wilson v. Retail Credit Company, 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972).

[89] *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court held that a right of personal privacy does exist under the penumbra of the Bill of Rights. *See also* Roe v. Wade, 410 U.S. #113 (1973), holding that if a "fundamental" right is involved, a compelling state interest must be shown in order to restrict these rights.

tims of crimes in certain cases as an aid in identification, in order to promote the public safety; the need to preserve records in order to allow the preparation of a defense in any action founded upon alleged police misconduct in regard to the arrest; and the need to maintain records in order that statistical profiles of arrests may be compiled and made available to legislatures or agencies in considering changes of laws or procedures.[90]

The Mississippi statute[91] does not require that the arrest record remain confidential at the local level. Although individual police departments generally set their own guidelines as to whom the information will be disseminated,[92] there is a need to bring uniformity to these procedures by amending the statute to restrict dissemination of arrest data by local departments to other law enforcement agencies or judicial bodies, and then only for legitimate law enforcement purposes. The statute should expressly prohibit the dissemination of arrest records to private individuals or to non-law enforcement agencies unless the arrestee has become a fugitive from justice. Further, the statute should provide some criminal or civil penalty for violation of the restriction.[93] A restriction on dissemination would effectively limit quasi-enforcement agencies or individuals with some general law enforcement duties from gaining access to records without court approval; additionally, to diminish prejudicial considerations, judicial bodies, parole boards, or licensing bureaus with bona fide interests in viewing records should be given access to only those records which have culminated in convictions.[94]

VI. Conclusion

In the interest of the public good, an amendment of the Mississippi Code provisions which ensures confidentiality and restricts dissemination would probably be the more appropriate form of protection for one who has been arrested but not convicted of a crime. Except in special circumstances,[95] the complete expunction or destruction of the record would not be warranted, provided that there were proper safeguards on dissemination of the record. However, a provision for sealing the record should be added to the present statute, in order to provide further relief in specified cases.[96] A limited form of relief is presently available in Mississippi, in that proceedings of the family court, which may be used for statistical purposes, must omit the names or identity of juveniles who are processed before the court.[97] As a further safeguard for an adult arrested but not subsequently convicted of a crime, Mississippi should provide for similar treatment of all records. By allowing data to be disseminated to courts or to interested agencies concerning arrests, but with the name or other identifying factors omitted as to individuals who have not been convicted, the needs of the public may be served while protecting the privacy of the individual. If coordinated with a restrictive dissemination amendment to the present statute, legitimate law enforcement purposes would not be jeopardized under this plan, as the name or other identifying factors could still be released to law enforcement agencies under the proper circumstances.[98]

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[90] *See* Note, *Discrimination on the Basis of Arrest Records,* 56 Cornell L. Rev. 470, 473 n. 19 (1971), citing cases in which the use of arrest records by courts in determining sentences have been upheld. *See also* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Proration § 2.3 (Tent. Draft 1973), recommending that presentence reports make no mention of arrests not culminating in conviction. *See generally* Annot., 46 A.L.R.3d 900 (1972).

[91] Miss. Code Ann. § 99—15—13 (1972).

[92] *See* notes 85-86 *supra.* Miss. Code Ann. § 99—15—13 (1972) does, however, specify that copies of fingerprints and photographs taken upon arrest shall be forwarded to the Identification Bureau of the Department of Public Safety.

[93] *See, e.g.,* N.Y. Civ. Rights Law § 79-e (McKinney Supp. 1973), which provides that an officer who fails to return arrest records to one charged but not convicted of a crime shall be guilty of a misdemeanor. This principle could be adopted in Mississippi and provide that an officer who disseminates information to unauthorized individuals or agencies would be guilty of a misdemeanor or subject to civil penalties.

[94] *See* Note, 56 Cornell L. Rev., *supra* note 90.

The Mississippi statute, as presently constituted, provides that in *every* arrest, fingerprints and photographs, if necessary, should be made and forwarded to the Identification Division of the Department of Public Safety.[99] This portion of the statute should be amended to provide that only arrest data taken in crimes of a serious nature should be forwarded to the State Bureau. This amendment would bring the state policy into accord with present F.B.I. procedures,[100] and would protect one arrested for misdemeanors or for insignificant offenses[101] against possible repercussions as a result of the dissemination of his arrest record. Finally, the legislature, particularly in the case of a record which has been widely disseminated, should impose upon law enforcement agencies an express duty to attach a notation to the arrest record as to the final disposition of an arrest, in order to protect an individual against misleading impressions which may be gained by one who views the record. This latter recommendation is echoed by F.B.I. Director Clarence M. Kelly, who blames state and local police departments for the failure to provide follow-up information as to records submitted to the F.B.I., and for the concomitant incompleteness of the national computer files on individuals. Such incompleteness leads to much of the difficulty encountered by individuals who have an arrest record but who have not been convicted of a crime.[102]

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[95] The circumstances may include a wide range of general equitable considerations, such as an arrest made without probable cause and thus serving no legitimate police function. *See, e.g.,* Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971); juvenile arrest cases; or where there has been an improper dissemination of the record publicly including to newspapers or placement in a public "rogue's gallery" after one's acquittal; Itzovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906).

[96] *See, e.g.,* CAL. PENAL CODE § 1203.4 (West 1970).

[97] MISS. CODE ANN. § 43—23—41 (1972).

[98] These circumstances may include reciprocal agreements such as those presently utilized by the F.B.I. See text accompanying note 10 *supra.* Under this arrangement, information may be disseminated to local law enforcement agencies for legitimate purposes only when the local department submits fingerprints, photographs or other identifying data to the Criminal Identification Division of the F.B.I., which then runs a check of its records to determine whether the individual in question has a previous arrest record for a serious offense. This procedure could be instituted in Mississippi by requiring either local departments or the State Identification Bureau to disseminate previous arrest data as to an individual only in response to a specific inquiry by a law enforcement agency for a valid law enforcement purpose.

[99] MISS. CODE ANN. § 99—15—13 (1972).

Mississippi, with a majority of other States, has overlooked the growing threat to the individual rights of one who has been arrested but not convicted of a crime. As is the case with most States, this neglect probably has resulted from the legislature's unawareness of the increasing capabilities of government to collect and maintain personal data in vast quantities via computerized techniques. With this continuing growth in governmental capability comes an urgent need for the Mississippi Legislature to establish statutory guidelines governing the dissemination of arrest records to ensure that individual rights of privacy are properly balanced against the government's need to maintain adequate records for investigative and identification purposes.

William L. Shappley, Jr.

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[100] *See* note 13 *supra.*

[101] *See id.,* for a delineation of F.B.I. guidelines as to nonserious offenses.

[102] The Clarion-Ledger—Jackson Daily News, August 19, 1973, at § C-2, col. 4.

INSURANCE NOTICE CLAUSES IN MISSISSIPPI

I. Introduction

The law as applied to a provision in an insurance policy requiring the insured to give the insurer prompt notification of an accident is in great need of clarification in Mississippi. The Mississippi attorney confronted with a problem involving a notice clause will be faced with various inconsistencies in his research which may plague him throughout his handling of the case.

Notice clauses are generally provided in most insurance policies. The clauses vary in form, but in essence they provide that the insured or his agent must give notice of any accident or loss to the insurer within a certain time after the occurrence of the accident. The standard notice provision, which has been adopted by most larger insurance companies, provides:

> In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable . . . .[1]

The problems which accompany the application of such a clause are numerous.

Typically, the insured is involved in an automobile accident and fails to notify the liability insurance company within the time provided in the notice clause of the policy. Accordingly, the company disclaims liability on the ground that the insured failed to comply with the contract, and therefore, forfeits all right to recovery. The insured, on the other hand, claims that unless the company has been prejudiced in its investigation by the delay in receiving notice, the insurance company cannot deny liability under the policy.[2] The insured further claims that the time limitation in the clause in effect shortens the statute of limitations as prohibited by Section 724 of the Mississippi Code of 1942,[3] and is therefore void.

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[1] N. Risjord & J. Austin, Automobile Liability Insurance Cases, *Text of 1967 Standard Provisions for General Automobile Policies* 261 (Supp. 1972). The standard provisions of the automobile liability polices were prepared and adopted by the committees and members of the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau, which represent many of the large stock and mutual companies in the United States. The first standard provisions were prepared in 1936. These provisions and the subsequent revisions have been adopted by many independent insurance companies, large and small. With minor variations, the provisions are in use in all 50 states.

The purpose of this comment is to analyze this problem and, in so doing, present the current status of the Mississippi law in this area. The following sections will attempt to pinpoint Mississippi's position as to the general law of notice clauses and analyze the Mississippi cases construing this law. The inconsistencies of these cases have caused, and will continue to cause, the attorney many problems in his research of the law in this area. Hopefully, this comment will serve both as a research tool for attorneys confronted with such a problem, and as an analytical presentation of problems long neglected by the courts.

II. SUFFICIENCY OF NOTICE

A. Validity and Purpose

It is well settled that an insurance policy provision requiring notice of an accident or loss is a valid, reasonable, and binding stipulation.[4] Only a few recent cases contain any express statement of the validity of such provisions; however, it appears that their validity is well recognized in all jurisdictions, and is no longer questioned.[5] The validity of the notice provision was recognized in Mississippi in *Downing v. Home Indemnity Co.*[6] and *State Mutual Insurance Co. v. Watkins.*[7] In these cases the court stated that the right to notice is an "important right" and an insurance company has " ' . . . the right to provide for' it in the stipulation of its policy."[8]

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[2] Comment, *The Materiality of Prejudice To The Insurer as a Result of The Insured's Failure to Give Timely Notice,* 74 DICK. L. REV. 260 (1969). This comment by F. Warren Jacoby presents an excellent discussion of the role which prejudice plays in relation to the notice clause. The ideas of Mr. Jacoby are used extensively in the section on prejudice.

[3] MISS. CODE ANN. § 724 (1956). The statute specifically provides:

> The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants.

[4] Annot., 18 A.L.R.2d 443, 450 (1951); Annot., 17 A.L.R.3d 530, 539 (1968); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4731, at 4 (1962). Such provisions permit the parties to stipulate that failure to give notice of the accident within a certain time shall preclude recovery on the policy, provided that the time limitation is not unreasonable and there is no statute to the contrary. 44 AM. JUR. 2d *Insurance* § 1455 (1969).

[5] Annot., 18 A.L.R.2d 443, 450 n.6 (1951).

[6] 169 Miss. 13, 152 So. 841 (1934).

[7] 181 Miss. 859, 180 So. 78 (1938).

The purpose of the notice provision is to give the insurance company the opportunity to make a timely and adequate investigation of all the circumstances.[9] Without timely notification, the insurer may be greatly disadvantaged in his investigation of the accident, for "In a very little time the facts may . . . fade out of memory, or become distorted; witnesses may go beyond reach; physical conditions may change; and, more dangerous than all, fraud and cupidity may have had opportunity to perfect their work."[10]

The Mississippi courts have weighed these considerations in determining the effect of the notice provisions upon the parties, and have accordingly recognized that timely notice is necessary for a "proper investigation" and a "proper defense."[11] The Mississippi Supreme Court elaborated on this need in *Metropolitan Life Insurance Co. v. Lindsey,*[12] when it stated that "[i]t is absolutely necessary that . . . insurance companies, who are doing a business which is effected with a public interest, have notice of a claim of injury or death in such reasonable time as to permit a fair investigation of the facts involved in order to relieve itself from payment of fraudulent claims."[13] The court further stated that if the insured is permitted to delay in giving notice or making proof, he would have a decided advantage in the development of the facts.

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[8] State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 869, 180 So. 78, 80 (1938); Downing v. Home Indem. Co., 169 Miss. 13, 20, 152 So. 841, 842 (1934).

[9] Annot., 18 A.L.R.2d 443, 451 (1951); 13 G. COUCH, COUCH ON INSURANCE § 49:2 (2d ed. 1965); 2 R. LONG, THE LAW OF LIABILITY INSURANCE § 13.02 (1966); 44 AM. JUR. 2d *Insurance* § 1455 (1969); "Such a requirement [of notice] tends to protect the insurer against fraudulent claims, and also against invalid claims made in good faith. And further, if the insurer is thus given the opportunity for a timely investigation, reasonable compromises and settlements may be made, thereby avoiding prolonged and unnecessary litigation." 8 J. APPLEMAN, *supra* note 4, § 4731 at 3.

[10] Travelers Ins. Co. v. Myers, 62 Ohio St. 529, 57 N.E. 458, 459 (1900).

[11] State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 869, 180 So. 78, 80 (1938); Downing v. Home Indem. Co., 169 Miss. 13, 20, 152 So. 841, 842 (1934).

[12] 189 Miss. 600, 198 So. 282 (1940).

[13] *Id.,* 198 So. at 283. Moreover, in Aetna Life Ins. Co. v. Walley, 174 Miss. 365, 164 So. 16 (1935), the court said that notice provisions conferred a valuable right upon the appellant [insurer], the purpose of which was to enable it to investigate a claim . . . covered by the policy; to itself decide whether the claim should be settled without litigation, and, if not, to prepare its defense thereto, ..." *Id.* at 375, 164 So. at 19.

B. Time for Giving Notice

Normally an insurance policy requires that notice be given "upon the occurrence of an accident or loss."[14] This requirement has generally been held to mean that the insured becomes obligated to give notice at the time of the accident or at the time the insured has knowledge of the accident.[15]

The Mississippi Supreme Court has held, however, that the requirement that notice be given "upon the occurrence of an accident" does not include a "trivial" occurrence or accident.[16] The court said that ". . . it is only when, and not until, some claim of liability is presented which, under the terms of the claim, is within the coverage of the policy, that any notice of the particular claim is necessary."[17]

Normally the time for giving notice for losses in a fidelity policy is the same as under an accident policy.[18] Yet it appears that the Mississippi Supreme Court has been more lenient in determining when notice must be given for losses under a fidelity policy. In *Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Co.*,[19] the court said that there must be knowledge of the facts of the loss, and that mere suspicion or inferences arising from irregularities are not sufficient to prompt the giving of notice. The insured must be aware of the loss with sufficient certainty before he is obligated to give notice to the insurer.[20]

C. Who Gives and Who Receives Notice

It does not matter who gives notice of the accident as long as notice is given.[21] The courts are more concerned with whether notice was given than with who gave it.[22] The Mississippi case *Massachussetts Protective Association v. Cranford*[23] is directly in point. In *Cranford,* the court said that the local agent's authority to give notice to the company was immaterial, since notice had been received.[24]

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[14] *See* N. Risjord & J. Austin, *supra* note 1.

[15] Annot., 18 A.L.R.2d 443, 461 (1951); 8 J. Appleman, *supra* note 4, § 4733; 44 Am. Jur. 2d *Insurance* § 1458 (1969). The "accident" in a liability policy has been defined as an undesigned and unforeseen occurrence resulting in injuries of the kind insured against. 8 J. Appleman, *supra* note 4, § 4733 at 20.

[16] State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 869, 180 So. 78, 80 (1938).

[17] *Id.* at 869, 180 So. at 80.

[18] Note 15 *supra*. Fidelity insurance is that form of insurance which indemnifies the insured for losses from dishonesty on the part of the employee, Black's Law Dictionary 943 (rev. 4th ed. 1968). The word "loss" in a fidelity policy means the ". . . *injury* or *damage* caused by the accident [loss] for which the insurer may, under the provisions of the policy be liable, though at such time the extent of the loss may not be ascertainable." Lewis v. Commercial Cas. Ins. Co., 142 Md. 472, 121 A. 259, 261 (1923).

[19] 49 So. 2d 813 (Miss. 1951).

[20] *Id.*

[21] Annot., 18 A.L.R.2d 443, 458 (1951); 8 J. Appleman, *supra* note 4, § 4738; 2 R. Long, *supra* note 9, § 13.06; 44 Am. Jur. 2d *Insurance* § 1476 (1969); Comment,

The rule is more restrictive as to who may receive notice. In absence of any specific requirement that notice be given to a certain person, most jurisdictions permit the giving of notice only to a person considered to be an authorized agent of the insurer.[25] Although this rule is clearly stated, there has been confusion as to who is an "authorized agent."[26]

In Mississippi, the courts have been relatively liberal in determining who is a proper agent to receive notice. The courts have held that a

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The Requirements and Effect of the Notice Condition in the Liability Insurance Policy, 51 Marq. L. Rev. 366, 367 (1967-68); *e.g.,* Pallasch v. United States Fidelity & Guar. Co., 329 Ill. App. 257, 67 N.E.2d 883 (1946). *See* Patterson & Young, Cases and Materials on the Law of Insurance ch. 5 (4th ed. 1961) which discusses ". . . the origin of the insurance contract as a private contract between the insurer and the insured, and its development to aid the injured third party." Comment, *The Requirements and Effect of the Notice Condition in the Liability Insurance Policy, supra* at 367 n.6.

[22] Comment, *The Requirements and Effect of the Notice Condition in the Liability Insurance Policy, supra* note 21, at 367.

[23] 137 Miss. 876, 102 So. 171 (1924).

[24] *Id.; accord,* Fleming v. Travelers' Ins. Co., 206 Miss. 284, 39 So. 2d 885 (1949).

[25] Annot., 18 A.L.R.2d 443, 456 (1951); 8 J. Appleman, *supra* note 4, § 4736; 13 G. Couch, *supra* note 9, § 49:65; 2 R. Long, *supra* note 9, § 13.07; 44 Am. Jur. 2d *Insurance* § 1479 (1969); *e.g.,* Hankins v. Public Serv. Mut. Ins. Co., 192 Md. 68, 63 A.2d 606 (1949).

[26] One court stated that an agent is one who is ". . .*expressly or impliedly authorized to represent it* [the insurance company] *in dealing with third parties . . . in matters relating to insurance.*" Hankins v. Public Serv. Mut. Ins. Co., 192 Md. 78, 63 A.2d 606, 611 (1949). A Mississippi statute gives the following definition of an insurance agent:

> Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance, or a policy of insurance, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, collect or transmit any premium of insurance, or make or forward a diagram of any building, or do or perform any other act or thing in the making or consummation of any contract of insurance, for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance, or request, or by the employment of the insurance company, or of, or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract; . . . .

Miss. Code Ann. § 5706 (1956).

cashier, having authority to transfer applications under the policies,[27] an agency which delivered the policy and collected the premiums,[28] and a local or district agent[29] were all agents with authority to receive notice. Normally, neither an insurance broker[30] nor an independent adjuster[31] is considered to be a proper party to receive notice. Perhaps the best method of determining who is an authorized agent is to consider whether a party was intended to be such an agent from the surrounding facts and circumstances of the case.[32]

D. Form of Notice

Most insurance policies provide that the insured must give "sufficient particulars" of the accident or loss to identify the parties and enable the insurer to obtain information of the circumstances of the incident.[33] Normally this requires detail sufficient to enable the insurer to reasonably determine whether a claim will be made against the insured, and whether the insurer should take action necessary to protect its interests.[34] The courts, however, are more ". . . concerned with substance rather than form in this area and, as a consequence, any writing which furnishes sufficient information is generally deemed adequate."[35]

Apparently Mississippi follows this general rule. In one case the court held that an "extended report" sent to a local agent complied with the notice provision.[36] And in a case in which it applied Texas law, the court alluded to the fact that Mississippi was very liberal as to its requirements of the form of notice.[37]

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[27] Reliance Life Ins. Co. v. Cassity, 173 Miss. 840, 163 So. 508 (1935).

[28] Fleming v. Travelers' Ins. Co., 206 Miss. 284, 39 So. 2d 885 (1949).

[29] State Farm Mut. Auto. Ins. Co. v. McKay, 209 Miss. 706, 48 So. 2d 349 (1950).

[30] Arthur v. London Guar. & Acc. Co., 78 Cal. App. 2d 198, 177 P.2d 625 (1947).

[31] Alexander v. Standard Acc. Ins. Co., 122 F.2d 995 (10th Cir. 1941); Burbank v. National Cas. Co., 43 Cal. App. 2d 773, 111 P.2d 740 (1941).

[32] Hankins v. Public Serv. Mut. Ins. Co., 192 Md. 78, 63 A.2d 606, 614 (1949).

[33] *See* N. RISJORD & J. AUSTIN, *supra* note 1.

[34] Annot., 18 A.L.R.2d 443, 460 (1951); 8 J. APPLEMAN, *supra* note 4, § 4739.

[35] Comment, *The Requirements and Effect of the Notice Condition in the Liability Insurance Policy, supra* note 21, at 369.

[36] Fleming v. Travelers' Ins. Co., 206 Miss. 284, 39 So. 2d 885 (1949).

[37] Southwestern Fire & Cas. Co. v. Kovar, 227 Miss. 386, 86 So. 2d 356 (1956). The court held that a mere letter failing to give information reasonably obtainable was not sufficient notice. Moveover, it held that an accident report sent to the Mississippi Safety Responsibility Bureau of the State Highway Patrol was insufficient notice. West Digest cites *Kovar* as authority for Mississippi's requirements of notice. This citation, however, is misleading, for the court expressly refused to consider Mississippi's more liberal rules of construction of notice provisions of liability policies. *Id.*

It has also generally been held that if the insurance policy requires that the notice be given in writing, the notice requirement will not be satisfied if oral notice is given instead.[38] If the policy does not specifically require written notice, however, the notice need not be in writing.[39] This distinction was specifically discussed by the Mississippi Supreme Court in *State Farm Mutual Automobile Insurance Co. v. McKay.*[40] In *State Farm,* the policy in question required written notice only in certain instances. The court held that in those instances where written notice is not specifically required, any kind of notice will suffice.[41]

Mississippi's liberal interpretation of the requirements as to the form of notice is the preferred approach since the purpose of a notice clause is merely to place the insurer on notice of an occurrence, rather than to require the insured to make a full investigation of the occurrence himself. The primary concern of the courts should be whether notice was in fact given by the insured, and not how it was given. An insured, not represented by counsel immediately after an accident, and few are, normally does not know the proper method of giving notice so that all necessary particulars are included. His normal reaction is to merely contact his insurance agent and explain to him what happened. This should be sufficient to enable the insurance company to make a proper investigation to determine whether the occurrence would be covered by the policy. The courts should determine whether notice was in fact given, but they should not be so strict as to disallow the notice because of a mere technicality in form.

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[38] Alexander v. Standard Acc. Ins. Co., 122 F.2d 995 (10th Cir. 1941); Bazar v. Great American Indem. Co., 306 N.Y. 481, 119 N.E.2d 346 (1954); Nelson v. Travelers' Ins. Co., 113 Vt. 86, 30 A.2d 75 (1943); Heimlich v. Kees Appliance Co., 256 Wis. 356, 41 N.W.2d 359 (1950). Failure to properly fulfill the requirement of written notice is considered a breach of contract which denies the insured a right of recovery. 2 R. LONG, *supra* note 9, § 13.08 at 13-17.

[39] Aetna Life Ins. Co. v. Duncan, 165 Ark. 395, 264 S.W. 835 (1924); Fitchburg Sav. Bank v. Massachusetts Bonding & Ins. Co., 274 Mass. 135, 174 N.E. 324 (1931). *See also* 13 G. COUCH, *supra* note 9, § 49:30.

[40] 209 Miss. 706, 48 So. 2d 349 (1950).

[41] *Id.* at 719, 48 So. 2d at 352. Written notice can be waived by the insurance company, but such waiver can be effected only by an officer of the company authorized to modify the policy. In Old Colony Ins. Co. v. Fagan Chev. Co. Inc., 246 Miss. 725, 150 So. 2d 172 (1963), the policy contained a no-charge provision. The court held that a general agent of an insurer who issues policies and collects premiums and adjusts claims does not have the authority to waive a provision of a policy requiring that reasonable notice of an accident must be given to the insurer, and upon receipt of process, it must be immediately forwarded to the insurer. The decision discusses the effect of Section 5706 of the Miss. Code of 1942 which makes brokers and other persons agents of the insurer. 2 R. LONG, *supra* note 9, § 1308 at 13-18 n.2.

III. WHAT CONSTITUTES A REASONABLE TIME

The wording of insurance notice clauses has taken a variety of forms. Some call for notice to be given "immediately;" others require that notice be given "within a reasonable time;" and still other state that notice must be given "as soon as practicable."[42] The courts have apparently held that the exact phraseology used in the clauses makes little, if any, difference, for it is well settled that such clauses do not require that notice be given instantly, but only that they be given within a "reasonable time" taking into consideration all the circumstances of each case.[43]

Mississippi recognized this interpretation in *McPike v. Western Assurance Co.*,[44] in which the court defined the phrase "as soon as possible" to mean within a "reasonable time."[45] As to what constitutes a reasonable time, the court in *Swan v. Liverpool, London & Globe Insurance Co.*[46] stated that it ". . . depends . . . upon the facts of each case. . . ."[47] The Fifth Circuit Court of Appeals, in an opinion by Judge Hutcheson, expounded on the general interpretation of reasonableness in its definition of the phrase "as soon as practicable:"[48]

> The time words in the clause 'as soon as practicable' are not words of precise and definite import. They are roomy words. They provide for more or less free play. They are in their nature ambulatory and subject under the guiding rule, to the impact of particular facts on particular cases. They do not in terms require immediate notice or notice within a particular number of days. They may not be so construed. They do not even provide for notice 'as soon as possible.' In terms, they require notice 'as soon as practicable' and they must be construed as requiring the notice within a reasonable time under all the circumstances, to effectuate the objects and purposes of the notice clause.[49]

Judge Hutcheson concluded that the Mississippi decisions have clearly settled that a particular notice provision is not absolute, ". . . to be given effect as upon an arbitrary time table. Its effect must be determined in light of the situation existing both when the accident occurs and when the notice is given."[50]

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[42] *See* Annot., 18 A.L.R.2d 443, 462 (1951); 8 J. APPLEMAN, *supra* note 4, § 4734; 2 R. LONG, *supra* note 9, § 13.09; 44 AM. JUR. 2d *Insurance* § 1460 (1969).

[43] 44 AM. JUR. 2d *Insurance* § 1460 (1969).

[44] 61 Miss. 37 (1883).

[45] *Id.* at 44.

[46] 52 Miss. 704 (1876).

[47] *Id.* at 710.

[48] Young v. Travelers' Ins. Co., 119 F.2d 877 (5th Cir. 1941).

[49] *Id.* at 880.

This definition has been applied not only in Mississippi, but throughout the country and has produced some widely divergent results. Under particular factual situations, delays from 6 days to 30 months have been held unreasonable.[51] However, under similar circumstances delays of 1 day to 3 years have been considered reasonable.[52]

Mississippi has experienced similar results. In *Metropolitan Life Insurance Co. v. Lindsey*,[53] the court held that a 5-year delay in giving proof was unreasonable, where the delay was ". . . wholly unexplained, wholly unexcused . . . under the facts and circumstances of the case. . . ."[54] In *Harris v. American Motorist Insurance Co.*,[55] the court held that a 13-month delay in giving proof was unreasonable. In *Aetna Life Insurance Co. v. Walley*,[56] the court said that failure to receive any notice of a loss until the day of trial constituted an unreasonable delay, and that such failure was inexcusable since it resulted from the insured's negligence.

On the other hand, the Mississippi Supreme Court has considered similar delays to be reasonable. A 7-month delay in giving notice of loss on a fidelity bond was held to be reasonable in *Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Stores*.[57] Moreover, in *Employers' Liability Assurance Corp., Ltd. v. Jones County Lumber Co.*,[58] delay in giving notice until 10 days before trial was held to be reasonable under the circumstances. In *Young v. Travelers Insurance Co.*,[59] a federal court held that although "strictly speaking" a 3½-month delay in giving notice was unreasonable, it was not unreasonable under the circumstances.

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[50] *Id.*

[51] 8 J. Appleman, *supra* note 4, § 4734 at 29-36.

[52] *Id.*

[53] 189 Miss. 600, 198 So. 282 (1940).

[54] *Id.* at 608, 198 So. at 283.

[55] 240 Miss. 262, 126 So. 2d 870 (1961).

[56] 174 Miss. 365, 164 So. 16 (1935).

[57] 49 So. 2d 813 (1951).

[58] 111 Miss. 759, 72 So. 152 (1916).

[59] 119 F.2d 877 (1941). In *Young*, the court stated that the proper test for determining whether notice was reasonably given is one which is external and objective in nature. The court said that this standard takes no account of the personal equation of the parties in determining the reasonableness of the delay. Rather an "objective, external test" should be used, for ". . . [t]oo much water has run over the dam since that legal robot, the reasonably prudent man, with his objective or external standard, became dominant in the law." *Id.* at 879.

These cases perhaps can all be reconciled upon a determination of whether the insurer had suffered prejudice from the insured's delay in giving notice. It is submitted that this determination is the Mississippi court's major, if not the only, consideration in determining what is a reasonable time for giving notice. In both *Employers' Liability Assurance Corp., Ltd.* and *Young,* the court admitted that since prejudice was not shown, notice was considered to be reasonably given. It gave no other reason for its conclusions. If the court looks only to prejudice to determine the reasonableness of notice, then it has misapplied the test for determining whether notice was reasonably given. This logic will be discussed in subsequent portions of this comment.

IV. EXCUSE

It has generally been held that if an insured can show a valid excuse for his delay or failure in giving notice, he will not be precluded from recovery as a result of the delay.[60] The following excuses have been considered by the courts:

A. Negligence

A mere mistake as a result of carelessness or negligence will not excuse the insured's delay in giving notice or serve to extend the time for giving such notice.[61] In *Harris v. American Motorist Insurance Co.,*[62] the Mississippi Supreme Court said that, although the insured was not required to give notice until he knew of the accident, he will not be excused, since he knew of the accident and negligently failed to comply with the notice provision. Similarly, in *Aetna Life Insurance Co. v. Walley,*[63] the court said that a "delay must have occurred without fault or negligence on the part of the insured."[64]

B. Insanity and Sickness

The courts are in agreement that the insured will be excused for a delay in giving notice if the delay is a result of mental incapacity or a mentally disabling illness.[65] No cases have been reported in Mississippi which rely upon insanity as an excuse for noncompliance with the notice provision. It appears, however, that mental condition or violent physical suffering, which would prevent the giving of notice, would excuse the delay in Mississippi.

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[60] Annot., 18 A.L.R.2d 443, 470 (1951); 8 J. APPLEMAN, *supra* note 4, § 4741 at 65; 13 G. COUCH, *supra* note 9, § 49:90 at 693; 2 R. LONG, *supra* note 9, § 13.10 at 13-22. The insured, therefore, has the burden of proving sufficient extrinsic circumstances or events to excuse the delay or non-compliance with the notice provisions. 44 AM. JUR. 2d *Insurance* § 1466, at 334 (1969).

[61] 2 R. LONG, *supra* note 9, § 13.10, at 13-23; Annot., 18 A.L.R.2d 443, 473 (1951); *e.g.* Malloy v. Head, 90 N.H. 58, 4 A.2d 875 (1939); Ebert v. Balter, 74 N.J. Super. 466, 181 A.2d 532 (1962); Annot., 7 A.L.R. 192 (1920); Annot., 76 A.L.R. 76 (1932).

[62] 240 Miss. 262, 126 So. 2d 870 (1961).

[63] 174 Miss. 365, 164 So. 16 (1935).

[64] *Id.* at 376, 164 So. at 19.

C. Lack of Knowledge of the Accident

It has also been held that the insured will be excused if he had no knowledge of the accident and could not have acquired such knowledge by reasonable diligence.[66] This exception was recognized in Mississippi in *Employers' Liability Assurance Corp., Ltd. v. Jones County Lumber Co.*[67] in which the court held that an insured employer, who had not been informed of an employee's injury, was under no duty to give notice since he had no knowledge of the accident.

The court has stated, however, that the insured is under an active duty of care in the exercise of his business, so that he should be reasonably informed of any accidents and any necessary facts surrounding such accidents.[68] In *Harris v. American Motorist Insurance Co.,*[69] the court said that the insured's lack of knowledge of the accident resulted from his failure to perform his duty as a prudent man, to discover the facts of the incident, and that it therefore could not excuse his failure to give the required notice.

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[65] Annot., 17 A.L.R.3d 530, 550-52 (1968); 13 G. Couch, *supra* note 9, § 49:16, at 644; 44 Am. Jur. 2d *Insurance* § 1467 (1969); *e.g.,* Insurance Co. v. Boykin, 79 U.S. (12 Wall.) 433 (1870). This excuse is based upon the rationale, (1) that notice is merely a condition precedent, Mutual Life Ins. Co. v. Heilbronner, 116 F.2d 855, 858 (8th Cir.), *cert. denied,* 312 U.S. 707 (1941); Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S.W. 847 (1927), or (2) that an implied exception to the notice provision arises when it is determined that the insured was incapable of giving proper notice. Mutual Life Ins. Co. v. Johnson, 293 U.S. 335 (1934); Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S.E. 192 (1931). It is unclear what the standard for excusing compliance with a policy provision should be. Apparently a standard similar to the standard required for making a contract or for making a will would be proper. 13 G. Couch, *supra* note 9, § 49:16, at 645.

[66] Annot., 18 A.L.R.2d 443, 470 (1951); 8 J. Appleman, *supra* note 4, § 4742, at 71; 44 Am. Jur. 2d *Insurance* § 1469 (1969); *e.g.* Burbank v. National Cas. Co., 43 Cal. App. 2d 773, 111 P. 740 (1941).

[67] 111 Miss. 759, 72 So. 152 (1916).

[68]
> It is not enough for the insured to act upon his cursory knowledge of the facts; he must make an effort to know the facts. Thus, we find that notice of an accident may be excused if from all the circumstances 'there was no evidence that the injury existed'; 'if there was no reasonable ground for believing' there was injury; 'if the accident would not, in an ordinary mind, induce a reasonable belief that it might result in bodily injury'; 'when the insured has complied with its full duty to acquaint itself with all the facts surrounding the accident.' But 'the insured may not, without investigation whatever rely upon his own opinion.'

Fireman's Fund Indem. Co. v. Kennedy, 97 F.2d 882, 889 (9th Cir. 1938). *See* Annot., 18 A.L.R.2d 443 (1951); Annot., 76 A.L.R. 23 (1932).

[69] 240 Miss. 262, 126 So. 2d 870 (1961).

It has also been held that knowledge of an accident by an agent or servant of the insured will be imputed to the insured and thereby activate his duty to give prompt notice.[70] This has been qualified, however, to require that the agent must be authorized to recover and transmit the knowledge to the insured before knowledge will be imputed to the insured.[71] Mississippi has strictly interpreted who is such an agent. In *Employers' Liability Assurance Corp., Ltd. v. Jones County Lumber Co.*,[72] the court held that a logging foreman, who was not expressly required to report accidents, was not such an agent as would be required to notify the insured.

D. Trivial Occurrences

Delay in giving notice is generally excused where an accident is trivial, resulting in no apparent harm, or where the accident is one which furnishes no ground for the insured to reasonably believe at the time that a claim for damage would arise.[73] This exception is based upon the theory that notice is required only for accidents covered by the specific policy, and that trivial accidents are not such as would be covered by the policy.[74] Some jurisdictions, however, apply a rule which requires the insured to give notice regardless of the damages which might arise.[75]

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[70] 8 J. APPLEMAN, *supra* note 4, § 4742, at 74.

[71] *Id.* at 74-75.

[72] 111 Miss. 759, 72 So. 152 (1916).

[73] Annot., 18 A.L.R.2d 443, 474-75 (1951); 8 J. APPLEMAN, *supra* note 4, § 4743 at 78; 44 AM. JUR. 2d *Insurance* § 1475 (1969).

[74] Chapin v. Ocean Acc. & Guar. Corp., 96 Neb. 213, 147 N.W. 465, 467 (1914); The excuse is acceptable even though the occurrence, originally thought to be trivial, results in serious injury. Haas Tobacco Co. v. American Fidelity Co., 226 N.Y. 343, 123 N.E. 755 (1919). The question of reasonableness must be determined upon the facts as they existed at the time of the occurrence. *E.g.,* United States Fidelity & Guar. Co. v. Giroux, 129 Vt. 155, 274 A.2d 487 (1971). Most jurisdictions will not allow the insured to rely solely upon his unsupported opinion of the incident to determine whether to report it. Haas Tobacco Co. v. American Fidelity Co., 226 N.Y. 343, 123 N.E. 755, 756 (1919). *See* Polito v. Galluzzo, 337 Mass. 360, 149 N.E.2d 375 (1958); Narduli v. United States Fidelity & Guar. Co., 33 Misc. 352, 225 N.Y.S.2d 455 (1962).

[75] *E.g.,* Malloy v. Head, 90 N.H. 58, 4 A.2d 875 (1939); Jeannette Glass Co. v. Indemnity Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952); Resseguie v. American Mut. Liab. Ins. Co., 51 Wis. 2d 92, 186 N.W.2d 236 (1971).

Mississippi accepts the "trivial occurrence" exception, as illustrated in *State Mutual Insurance Co. v. Watkins*,[76] in which the court said that ". . . it is only when, and not until, some claim of liability is presented which, under the terms of the claim, is within the coverage of the policy, that any notice of the particular clause is necessary."[77] The court, however, has placed strict limitations upon the insured in his determination of the nature of the accident. In *Harris v. American Motorist Insurance Co.*,[78] the court said that the insured has an affirmative duty to investigate the accident to help determine whether the accident was trivial in nature. The insured cannot act upon his own cursory knowledge. He must make an effort to know the facts.[79]

E. Belief That No Liability Exists

Most jurisdictions hold that an insured can be excused from a delay in giving notice if he "reasonably" believes that he was not liable for the accident.[80] But in making the determination the insured must exercise a high degree of care and act in good faith as would a reasonably prudent person.[81] There is some authority for a rule which makes the insured act at his peril in determining the question of liability.[82] This rule makes the occurrence of the accident, rather than the insured's belief of liability, the determining factor as to whether to report the accident.[83]

It appears that this excuse is allowed in Mississippi, but the courts have construed the excuse so narrowly that the insured is required to act at his peril if he decides not to give notice. In *Young v. Travelers Insurance Co.*,[84] the insured failed to give notice because he believed he was not involved in the accident, that he was not at fault, and that no claim would be made against him. The court stated that the insured should have been put on notice to report the accident, notwithstanding his good faith belief that he was not liable.[85]

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[76] 181 Miss. 859, 180 So. 78 (1938).

[77] *Id.* at 869, 180 So. at 80.

[78] 240 Miss. 262, 126 So. 2d 870 (1961).

[79] *Id.*

[80] Annot., 18 A.L.R.2d 443, 472 (1951); 8 J. APPLEMAN, *supra* note 4, § 4744, at 83; 44 AM. JUR. 2d *Insurance* § 1474 (1969); *e.g.*, Cooper v. Employees Ins. Co., 51 N.J. 86, 237 A.2d 870, 871 (1968).

[81] *Id.*

[82] [W]here an accident occurs and the insured as a result of its own investigation is satisfied that no claims for personal injuries can be successfully made, and such insured does not immediately notify the insurer of the accident as required by the policy, it elects to carry the risk itself and absolves the insurer from liability.

A. M. Forbes Cartage Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 195 Ill. App. 75, 76 (1915). *See* Malloy v. Head, 90 N.H. 58, 4 A.2d 875 (1939); Jeannette Glass Co. v. Indemnity Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952).

[83] *See* State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 180 So. 78 (1938).

[84] 119 F.2d 877 (5th Cir. 1941).

F. *Mistake as to Coverage of the Policy*

The insured may also be excused for delay where he reasonably believes that the accident or loss was not within the coverage of his policy.[86] If the insured believes that the injury was not covered under the policy, the notice provision is considered to have been satisfied, assuming that notice is given within a reasonable time after the discovery of the coverage.[87]

In Mississippi, the court apparently accepts this excuse, but it has held that ignorance of the insurance coverage cannot be the result of negligence of the insured. In *Aetna Life Insurance Co. v. Walley*,[88] the court held that the insured's failure to keep the insurance policy in his possession, failure to remember the name of the insurer, and failure to attempt to ascertain the insurer's identity, constituted negligence and would prevent him from successfully claiming that he had no knowledge of the coverage of the insurance.

V. EFFECT OF A NOTICE CLAUSE

Much of the controversy surrounding a notice clause involves its effect; that is, whether the notice clause is a condition precedent to liability or whether it merely serves to postpone recovery on the policy. The courts have approached the controversy from various angles. Some have abandoned the strict "black-letter" approach to contract law and have transformed the insurance policy into an instrument which is guided more by public policy and an attitude of benevolence than by its seemingly conclusive terms.[89] Most, however, refuse to abandon the strict discipline of contract law and continue to place primary emphasis upon the sanctity of the policy.[90] The majority of jurisdictions hold that if an insurance policy expressly or impliedly makes the stipulation for notice a condition precedent to liability, and if the insured fails to give timely notice, the insurer will be relieved of any liability upon the policy.[91] These jurisdictions hold that the delay prevents recovery, not on the ground of forfeiture, since the policy remains in force but on the ground of non-performance of a condition precedent.[92]

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[85] *Id.*

[86] Annot., 18 A.L.R.2d 443, 478 (1951); 8 J. APPLEMAN, *supra* note 4, § 4745, at 87; 13 G. COUCH, *supra* note 9, § 49:14, at 643; 44 AM. JUR. 2d *Insurance* § 1473 (1969); *e.g.*, State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950).

[87] *E.g.*, Allstate Ins. Co. v. Campbell, 95 N.J. Super. 142, 230 A.2d 179 (1967).

[88] 174 Miss. 365, 164 So. 16 (1935); *accord*, State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 180 So. 78 (1938).

[89] Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice*, *supra* note 2, at 261; *e.g.*, Miller v. Marcantel, 221 So. 2d 557 (La. 1969); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968).

Typically, an insurance policy contains a clause making the validity of the policy contingent upon the performance of all provisions [hereinafter referred to as "forfeiture clause"]. Such a clause might read: (1) The policy is issued "subject to the . . . conditions and other terms of the policy;"[93] or (2) "[n]o action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy."[94] If a forfeiture clause is contained in the policy then a requirement of prompt notice is considered a condition precedent to recovery.[95] Accordingly the courts consider prejudice, or more important the lack of it, immaterial, since the insured has failed to meet an integral part of the insurance contract.[96]

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[90] Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966); Sohm v. United States Fidelity & Guar. Co., 352 F.2d 65 (6th Cir. 1965); Lee v. Bituminous Cas. Corp., 330 F.2d 514 (5th Cir. 1964); Lumbermens Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932 (W.D. Va. 1968); General Acc. Fire & Life Assur. Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965); Commercial Contractors Corp. v. American Ins. Co., 152 Conn. 31, 202 A.2d 498 (1964); State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950); Underwriters at Lloyds, London v. Harkins, 427 S.W.2d 659 (Tex. Civ. App. 1968); Sears, Roebuck & Co. v. Hartford Acc. & Indem. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957).

[91] Preferred Acc. Ins. Co. v. Castellano, 148 F.2d 761 (2nd Cir. 1945); Standard Acc. Ins. Co. v. Turgeon, 140 F.2d 94 (1st Cir. 1944); Zauderer v. Continental Cas. Co., 140 F.2d 211 (2nd Cir. 1944); Dunn v. Travelers Indem. Co., 123 F.2d 710 (5th Cir. 1941); State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950); Whittle v. Associated Indem. Corp., 130 N.J.L. 576, 33 A.2d 866 (1943); Harmon v. Farm Bureau Mut. Auto. Ins. Co., 72 Va. 61, 200 S.E. 616 (1939); Springfield Cooperative Freeze Locker Plant, Inc. v. Wiggins, 115 Vt. 445, 63 A.2d 182 (1949).

[92] *E.g.*, National Paper Box Co. v. Aetna Life Ins. Co., 170 Mo. App. 361, 156 S.W. 740, 743 (1913); Underwood Veneer Co. v. London Guar. & Acc. Co., 100 Wis. 378, 75 N.W. 996, 997 (1898).

[93] State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606, 607 (1950); 2 R. LONG, *supra* note 9, § 13.03, at 13-15.

[94] State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606, 609 (1950); 2 R. LONG, *supra* note 9, § 13.03, at 13-15.

[95] Note 91 *supra*.

This rule has been generally accepted in Mississippi. In *Harris v. American Motorist Insurance Co.*,[97] the court held that where a policy requires, as a condition precedent to liability, that notice be given within a reasonable time, such notice must be given within the time agreed upon, unless there is a reasonable excuse. The court illustrated the precise limits of the application of the rule in *Southern States Fire Insurance Co. v. Hand-Jordan Co.*,[98] when it refused to apply the forfeiture clause to provisions of the policy which it considered "not covered" by the clause.

Where there is not an express or implied provision making notice a condition precedent to liability, there is a conflict among the jurisdictions as to the effect of the notice clause.[99] The majority of the jurisdictions hold that the requirement of notice is the "essence" of the policy and serves as a condition precedent to liability, notwithstanding the absence of a forfeiture clause. These jurisdictions follow the rationale that the courts must strictly adhere to the express provisions of the contract.[100]

A minority of jurisdictions, however, hold that if there is no express or implied stipulation making notice a condition precedent, failure to comply with notice requirements does not cause the insured to forfeit his right of recovery.[101] In order for the insurer to be relieved of liability he must have suffered prejudice from the delay.[102] In these jurisdictions, contract law is still applied, but the courts consider the terms of the contract to be vague and ambiguous. Thus, the intent and purpose of the parties, as opposed to their expressed agreement, becomes important.[103]

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[96] *Id.* In Whittle v. Associated Indem. Corp., 130 N.J.L. 576, 33 A.2d 866 (1943), the court said that where an automobile policy made notice a condition precedent to recovery, the insured's failure to furnish notice would allow the insurer to terminate the policy regardless of whether such failure prejudiced the insurer.

[97] 240 Miss. 262, 126 So. 2d 870 (1961).

[98] 112 Miss. 565, 73 So. 578 (1917).

[99] For a good discussion of the conflict among the jurisdictions, *see* State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950).

[100] *E.g.*, Nelson v. Travelers Ins. Co., 113 Vt. 86, 30 A.2d 75 (1943); 8 J. APPLEMAN, *supra* note 4, § 4732; Annot., 18 A.L.R.2d 443, 454 (1951); 2 R. LONG, *supra* note 9, § 13.04.

[101] Annot., 18 A.L.R.2d 443, 455 (1951); 8 J. APPLEMAN, *supra* note 4, § 4732; *e.g.*, Bowman Steele Corp. v. Lumbermens Mut. Cas. Co., 364 F.2d 246 (3d Cir. 1966); Leach v. Farmer's Auto. Interinsurance Exch., 70 Idaho 156, 213 P.2d 920 (1950); Brookville Elec. Co. v. Utilities Ins. Co., 142 S.W.2d 803 (Mo. App. 1940).

[102] Annot., 18 A.L.R.2d 443, 455 (1951).

Mississippi adopted the minority rule in 1916 in *Employers' Liability Assurance Corp., Ltd. v. Jones County Lumber Co.*,[104] in which the court, quoting from an Arkansas case,[105] said:

> [F]ailure to give notice . . . does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes the giving of notice, within a time specified, a condition precedent to recovery. . . . In the absence of an express stipulation declaring this [notice] requirement to be the essence of the contract, and therefore a condition precedent to the right of recovery, we do not think that it is correct to say that such a requirement is of the essence of the contract unless it is shown to materially affect the rights of the parties in the given case [prejudice]. We fail to see why it should be so in an insurance policy any more than in any other contract, where strict compliance with every specification of the contract is generally held not to be of the essence of the contract unless made so by the terms of the contract or by necessary implication.[106]

The Mississippi court has applied the rule in numerous instances. In *American National Insurance Co. v. Waters*,[107] the court held that a 15-day delay in giving notice would not serve to relieve the insurer from liability, when the notice clause was not made a condition precedent to recovery. Similarly, in *Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Stores*,[108] the court held that since a fidelity bond policy did not contain a forfeiture clause, and since notice was not made the essence of the contract by necessary implication, the insurer could not be relieved of liability unless prejudice was shown from the delay in giving notice.

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[103] Comment, *The Materiality of Prejudice to the Insurer as a Result of The Insured's Failure to Give Timely Notice*, *supra* note 2, at 264-65; *see, e.g.*, Miller v. Marcantel, 221 So. 2d 557 (La. 1969); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968).

[104] 111 Miss. 759, 72 So. 152 (1916).

[105] Hope Spoke Co. v. Maryland Cas. Co., 102 Ark. 1, 143 S.W. 85 (1914).

[106] 111 Miss. 759, 763-64, 72 So. 152, 154 (1916).

[107] 133 Miss. 28, 96 So. 739 (1923).

[108] 49 So. 2d 813 (Miss. 1951); *accord*, Aetna Life Ins. Co. v. Walley, 174 Miss. 365, 164 So. 16 (1935); Fidelity & Deposit Co. v. Merchants' & Marine Bank of Pascagoula, 169 Miss. 755, 151 So. 373 (1933), *sustained in part and rev'd in part*, 169 Miss. 755, 154 So. 260 (1934); Southern States Fire Ins. Co. v. Hand-Jordan Co., 112 Miss. 565, 73 So. 578 (1917).

VI. PREJUDICE

Prejudice is a material consideration in those jurisdictions where notice is not a condition precedent to liability.[109] A number of jurisdictions have adopted a rule which provides that in order to be relieved of liability the insurer must have been "materially and substantially hampered in the making of its defense or in the discovery of the facts by the delay in receiving notice"[110] [hereinafter referred to as the "prejudice rule"]. The courts have applied various methods in seeking to satisfy each jurisdiction's interpretation of the prejudice rule.

Some jurisdictions have created a "rebuttable presumption" that the insurer automatically suffers prejudice upon a delay in receiving notice.[111] In these jurisdictions the burden of proving the lack of prejudice is placed upon the insured, thereby preventing the insurer from avoiding liability by merely labeling the stipulation a condition precedent.[112] Not only does the presumption enable the insurer to avoid an inequitable forfeiture, but it also allows the question of the existence of prejudice to be decided by the jury.[113] Normally, a strict contractual question as to the insurer's liability is treated as a matter of law to be decided by the court. By allowing the question of prejudice to go to the jury, the insured benefits from the theory that juries favor a private individual over an insurance company.[114] The presumption has been praised in many circles as a commendable innovation recognizing and extinguishing the practical difficulties of the prejudice rule, and as a workable method to accomplish changes in an already existing rule.[115]

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[109] *E.g.*, Leach v. Farmer's Auto. Interinsurance Exch., 70 Idaho 156, 213 P.2d 920 (1950); Jackson v. State Farm Mut. Auto. Ins. Co., 211 La. 19, 29 So. 2d 177 (1946); Kennedy v. Dashner, 319 Mich. 491, 30 N.W.2d 46 (1947); Brookville Elec. Co. v. Utilities Ins. Co., 142 S.W.2d 803 (Mo. App. 1940); Frank v. Nash, 166 Pa. Super. 476, 71 A.2d 835 (1950).

[110] 8 J. APPLEMAN, *supra* note 4, § 4732, at 17. Under an automobile liability policy requiring notice "as soon as practicable," if notice was delayed longer than was reasonably required, the material question is whether the delay has caused prejudice. Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941).

[111] *E.g.*, WIS. STAT. ANN. § 204.34 (3) (1965), which states: ". . . [F]ailure to give such notice shall not bar liability under such policy of insurance, . . . if the insurer was not prejudiced or damaged by such failure, but the burden of proof to so show shall be upon the person claiming such liability." Hubner & Williams Constr. Co., Inc. v. London Guar. & Acc. Co., 280 F. Supp. 288 (D. Colo. 1967); Purefoy v. Pacific Auto. Indem. Exch., 5 Cal. 2d 81, 53 P.2d 155 (1935); Bass v. Aetna Cas. & Sur. Co., 199 So. 2d 790 (Fla. App. 1967), *cert. dismissed*, 206 So. 2d 211 (Fla. 1968); Henderson v. Hawkeye-Security Ins. Co., 106 N.W.2d 86 (Iowa 1960).

[112] Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice*, *supra* note 2, at 266-67.

[113] *Id.*

[114] *Id.*; Note, 35 MO. L. REV. 430, 439 (1970); *see* Comment, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436 (1955).

The prejudice rule has been criticized, however, as being mere conjecture and speculation, for often there is no prejudice on which the presumption can be justified.[116] Critics also state that the insurer should have the burden of justifying his disclaimer since he is the one choosing to deny liability. Because the insurer is the party attempting to get out of the contract, the responsibility must be his to present proof justifying the attempt.[117]

Other jurisdictions, including Mississippi, avoid the inequities of a strict interpretation of the notice clause by considering prejudice as "one of the factors" in determining the reasonableness of the notice[118] [hereinafter referred to as the "factor method"]. In these jurisdictions the burden of showing prejudice is upon the insurer, rather than the insured, thus eliminating some of the problems criticized in the presumption method.[119] Theoretically, the insured still has the burden of complying with all conditions precedent to liability, but the insurer must introduce proof of prejudice if he wishes to be relieved of liability.[120]

Mississippi not only adheres to the factor method of the prejudice rule, but has expanded and strengthened it through its decisions. The general rule was presented in *Hartford Accident & Casualty Co. v. Hattiesburg Hardware Stores*,[121] in which the court stated that in order for the insurer to be relieved of liability, he must show that the delay "... resulted in such prejudice to its [the insurer's] rights ... as would make it inequitable to permit a recovery. . . ."[122] The rule was also applied in *Employers' Liability Assurance Corp., Ltd. v. Jones County*

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[115] Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906, 909 (1931).

[116] *See, e.g.,* Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941); Lindus v. Northern Ins. Co., 103 Ariz. 160, 438 P.2d 311 (1968); Campbell v. Allstate Ins. Co., 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963). *See generally* 2 R. LONG, *supra* note 9, § 13.05.

[117] Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice, supra* note 2, at 267.

[118] *See, e.g.,* St. Paul Fire & Marine Ins. Co. v. Wabash Fire & Cas. Ins. Co., 264 F. Supp. 637 (D. Minn. 1967); Consolidated Mut. Ins. Co. v. Radio Foods Corp., 108 N.H. 494, 240 A.2d 47 (1968).

[119] Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice, supra* note 2, at 268.

[120] 51 N.J. 86, 237 A.2d 870 (1968).

[121] 49 So. 2d 813 (Miss. 1951).

[122] *Id.* at 819.

Lumber Co.,[123] in which the court held that notice, which was not given until 10 days before trial, did not cause such damage and prejudice to the insurer as would allow him to avoid liability, since all witnesses were available and a sufficient investigation could be made.

Mississippi's position was probably best presented in *Young v. Travelers Insurance Co.*[124] Although the decision was rendered by a federal court, which is considered to be merely a forecast of substantive state law,[125] it should be considered an accurate interpretation of Mississippi law in this instance. In *Young* the court recognized the prejudice rule as applicable in Mississippi, but rejected the use of "a presumption of prejudice" as the proper method of applying the rule, stating that the presumption was conjectural and speculative. Instead, it said that the burden of proof should be upon the insurer to prove that the delay in giving notice had prejudiced his investigation or defense. In the same breath, the court said that speculative or hypothetical prejudice was not admissible and could not be considered in determining whether the insurer was prejudiced by the delay. The court said that speculative or hypothetical prejudice is "not the kind of prejudice at which the law looks" in construing the notice clause, and that actual prejudice must be shown to sustain the burden of proof. By refusing to consider speculative prejudice, the court may have, in effect, raised the burden of proof to an unreasonably high level because of the type of prejudice which is normally incurred from delay in receiving notice. This point will be discussed in the arguments criticizing the prejudice rule.

The court also held that prejudice could not be considered in determining the reasonableness of the notice until after the time limitations stipulated in the clause had been exhausted. The court stated that in order to avoid inequity the insurer should be prevented from proving that more reasonable notice would have been more effective in preparing a defense.[126] The court could apparently foresee a situation where notice, given within the time stipulated, could be held to be unreasonable if prejudice somehow resulted to the insurer. Such a result would clearly be inequitable, since an insured could faithfully meet all contract requirements and still not recover.

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[123] 111 Miss. 759, 72 So. 152 (1916); *accord,* Aetna Life Ins. Co. v. Walley, 174 Miss. 365, 164 So. 16 (1935); Fidelity & Deposit Co. v. Merchants & Marine Bank of Pascagoula, 169 Miss. 755, 151 So. 373 (1933).

[124] 119 F.2d 877 (5th Cir. 1941). This case is cited in 18 A.L.R.2d 443, 454, as authority for the majority rule that delay in giving timely notice will defeat recovery even if there is no express forfeiture clause making notice a condition precedent to liability. This citation is wrong. A reading of *Young* will show that it clearly applies the prejudice rule which states that if there is no forfeiture clause, delay will not bar recovery unless prejudice is shown.

[125] *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 58 (2d ed. 1970).

[126] Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941).

In order to properly understand the prejudice rule as applied in Mississippi and numerous other states, the arguments for and against the rule should be examined.

The jurisdictions which adopted the rule did so primarily to avoid the inflexibility of a strict interpretation of a notice clause and the inequities which flow from it.[127] These jurisdictions, however, are not concerned only with the injury to the insured resulting from such an interpretation, but also with the harm done to society.[128] The courts argue that because of the role which insurance plays in our society, and because it is considered to be an instrument of public policy, failure to consider prejudice when construing a notice clause will disserve the public interest.[129] As one court put it: "Insurance companies are franchised for the purpose of providing coverage for innocent victims. To allow the insurance company to escape liability for the very thing it bound itself to anticipate is dangerous to society."[130]

Moreover, advocates of the rule argue that the insurance companies force the insured to delay in reporting accidents by playing upon his fear that his premiums on his policy will skyrocket. Normally each time an insured has an accident, his premiums go up. Thus, the insured is reluctant to submit a notice of a claim until he is sure that a claim will be made against him, or that the accident is covered by the policy. This encourages the insured not to report minor accidents, or at least to delay in reporting them on the hope that he will not have to report them at all.[131]

Furthermore, it is argued that in light of the adhesive nature of an insurance policy it should not be construed as a true contract. The insured is charged with the terms of an insurance policy because of business utility rather than because he read and understood them. It is urged therefore that the contract should be read with reasonable expectations of the purchase, insofar as its language will permit, and not in strict contractual terms.[132]

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[127] Comment, *The Materiality of Prejudice of the Insurer as a Result of the Insured's Failure to Give Timely Notice, supra* note 2, at 266; Comment, *Insurance — Conditions — Effect of Non-Compliance with Notice Clause on Insurer's Liability*, 51 MICH. L. REV. 275, 284 (1952); Note, 35 MO. L. REV. 430, 437 (1970).

[128] *See, e.g.*, Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968); Jeanette Glass Co. v. Indemnity Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952) (dissenting opinion).

[129] Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870, 874 (1968).

[130] *Id. See generally* Jeanette Glass Co. v. Indemnity Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952) (dissenting opinion).

[131] Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice, supra* note 2, at 265-66.

Finally, it is argued that the prejudice rule is based upon the general premise that the true function of the requirement of prompt notice is to prevent prejudice, not to provide the insurer an escape by which he can deny coverage when no prejudice has resulted.[133]

Notice is of the utmost importance to the insurance company, and it is because of the urgent need for notice that the insurer is so strongly opposed to the prejudice rule. Normally, the only way to assure that notice will be given is to provide for notice within the contract.[134] Insurers argue that this provision is neither dictum nor a method by which insurers may escape liability, but it is an integral part of the contract agreed upon by the parties to safeguard the interests of each.[135] The insurer contends that the insured is not left unprotected if contract law is applied; he has only to give notice in a reasonable time as required by the policy.[136]

The insurance company further argues that the prejudice rule, notwithstanding its benevolent intentions, ignores the realities of the situation. The delay itself is "the very barrier which prevents the the insurer from proving prejudice"[137] and makes it impossible for injury to be shown. The insurers contend that there is "a vast difference between prejudice and judicially establishing prejudice, especially where the question is treated as one of fact for the jury."[138] "Legal evidence [can] rarely be found to establish what the result would have been if seasonable notice had been given."[139] Moreover, it is difficult to establish what would have happened if there had been an earlier investigation or a possible settlement. Delay, it is argued, deprives the insurer of the valuable contractual right of seasonably being able to determine the course best adapted to protect itself.[140]

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[132] Cooper v. Government Employees Ins. Co., 51 N.J. 86, 92, 237 A.2d 870, 873 (1968).

[133] Miller v. Marcantel, 221 So. 2d 557 (La. Ct. App. 1969); Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice, supra* note 2, at 264.

[134] Note, 12 ALA. L. REV. 406, 411 (1960).

[135] *See, e.g.,* Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966).

[136] Note, 12 ALA. L. REV. 406, 411 (1960).

[137] Comment, *Insurance — Conditions — Effect of Non-Compliance With Notice Clause on Insurer's Liability, supra* note 127, at 279.

[138] Note, 12 ALA. L. REV. 406, 411 (1960).

[139] Comment, *Insurance — Conditions — Effect of Non-Compliance With Notice Clause on Insurer's Liability, supra* note 127, at 279.

[140] Malloy v. Head, 90 N.H. 58, 64, 4 A.2d 875, 878 (1939).

Finally, the insurer contends it is against public policy to follow the prejudice rule, for to allow an unreasonable delay in giving notice would not only injure the insurer in his investigation of the case, but also harm the public through higher premiums and ineffective insurance administration. In accord with this position one court stated:

> . . . [R]ulings reflect the fact that efficient administration requires early knowledge of the claim in order that proper investigation may be made. Contractual provisions to secure this interest are, thus, to be given effect in the interest of the public as well as that of the insurer.[141]

In Mississippi, the Supreme Court has adopted the prejudice rule.[142] There are occasions when a strict interpretation of a notice clause would cause inequitable results,[143] and through the application of the prejudice rule, these inequities can be avoided. The method, however, by which the courts have applied the rule should be scrutinized.

The courts have been extremely liberal in their application of the prejudice rule. In most cases they have construed the notice clause strongly in favor of the insured,[144] and have been very reluctant to find prejudice unless there is overwhelming evidence of harm to the insurer. As the rule now exists in Mississippi, the insurer has the burden of proving "actual" prejudice from the insured's delay in giving notice.[145] Herein lies the problem, for oftimes the delay itself is the barrier preventing the insurer from proving prejudice. As previously mentioned, legal evidence can rarely be found to establish what would have happened if there had been no delay. This type of prejudice at best can only be estimated; yet the court has held that such "estimated" prejudice cannot be considered in determining whether the insurer suffered prejudice.[146] Thus the insurer is precluded from presenting evidence of the kind of prejudice which is the most prejudicial to him. James Appleman, a leading authority on the law of insurance, said: "Since it is often impossible for the insurer to know what witness it would have found or what facts it could have ascertained had immediate notice been given and a prompt investigation made, it is submitted that this test is unworkable."[147]

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[141] Waters v. American Auto. Ins. Co., 363 F.2d 684, 687 (D.C. Cir. 1966).

[142] Hartford Acc. & Cas. Ins. Co. v. Hattiesburg Hardware Stores, 49 So. 2d 813 (Miss. 1951).

[143] A typical example of the strict and oftentimes harsh consequences . . . can be seen in Sears, Roebuck & Co. v. Hartford Acc. & Indem. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957), in which a third party was injured when she fell into a hole after a paving job on plaintiff's parking lot. Assuming that no insurance coverage was involved, plaintiff, a self-insurer, undertook preparation of its own defense of the personal injury action. But, having determined that the defect was left by one of plaintiff's licensee's concessioners and that defendant's policy covered the licensee's negligence, plaintiff immediately forwarded notice of the accident to its insurer. Even though no evidence of the unavailability of any material witness to the accident was presented, and in spite of the fact that a continuance probably could have been taken in the case, the court preferred to rule that the 14-month delay in giving notice was a failure to fulfill the condition precedent of giving notice 'as soon as practicable,' and relieved the insurer of its liability under the policy.

Note, 35 Mo. L. Rev. 430, 439 n.47 (1970).

[144] *E.g.*, Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941); Hartford Acc. & Cas. Ins. Co. v. Hattiesburg Hardware Stores, 49 So. 2d 813 (Miss. 1951).

[145] Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941).

In light of the inherent difficulty in carrying this burden of proof, it is a value judgment as to whom the court feels should be saddled with this "perhaps unreasonable" burden. Admittedly it is the insured who has failed to comply with the provisions of the contract, not the insurer. Moreover, it is no answer to say that it is better to place the burden upon one party because he can better afford to sustain a loss. However, the insured's burden of proving "lack of prejudice" is a much greater burden than one requiring the insurer to prove that there was prejudice. It is much more difficult to prove the nonexistence of a fact, than the existence of it. For instance, the insurer has better access than does the insured to the facts which would show that he suffered prejudice and the insurer is also in a better position to present all the ramifications of these facts to show why he was prejudiced.[148] By considering prejudice as only one factor in determining the reasonableness of notice and by placing the burden of proving prejudice upon the insurer, the Mississippi Supreme Court has chosen the most equitable method, under normal circumstances, of applying the prejudice rule. In the application of this rule, however, the court may be misinterpreting the proper test or consideration on which it should focus its attention.

Shouldn't the test be whether the insured could reasonably have given notice, or reasonably have been expected to give notice, rather than whether the insurer has suffered prejudice by the delay? In actuality the court apparently has not considered prejudice merely as *one* of the factors in determining the reasonableness of a delay, but as the *only* factor. If this be the case, then the prejudice rule is being undermined, and the court is misapplying its own rule. The courts have said that the proper question to be determined is whether the giving of notice was reasonable under all the circumstances of each case.[149] Why, then, should prejudice be given as much weight as it apparently has in the past cases? It is submitted that the emphasis of the court's determination should be placed upon the "reasonableness" of the insured's action in light of all the circumstances, and not merely upon whether the insurer incurred prejudice.

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[146] *Id.* at 880.

[147] 8 J. Appleman, *supra* note 4, § 4732, at 17-19.

[148] There might be times when an insured would be in a better position to meet the burden of proof. This could occur in instances where the insured, because of his closeness to the occurrence, could readily see circumstances where the delay caused prejudice. Because the insurer was not close to the occurrence he could have no way of foreseeing what would have happened, but for the delay.

VII. Statutes

In the preceding sections, the general rules of the law of notice have been presented and discussed as they are applicable to Mississippi. Although it appears at first glance that Mississippi adheres to the general rules, whether from the majority or minority point of view, there is an obscure line of cases in the law of notice which is inconsistent with the general law.[150] The law, as presented in these cases, infers that notice clauses are affected and perhaps voided by a statute which forbids contractual change in the statutes of limitations.[151] The cases have held, or at least implied, that a notice provision, in effect, shortens or changes the statute of limitations, and is, therefore, violative of the statute prohibiting such a change. This portion of the comment will discuss these cases and assess their present applicability to the notice provisions in Mississippi.

It has generally been held that a state may regulate notice provisions in insurance policies by statute.[152] The statute controls the terms of the policy and serves to void any conflicting notice provision.[153]

Numerous states have adopted such statutes regulating notice provisions. In most of these states, the statutes specifically refer to the notice clauses of a policy and are designed to protect the insured from inequities resulting from a strict interpretation of such clauses.[154]

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[149] 44 Am. Jur. 2d *Insurance* § 1460 (1969).

[150] This line of cases includes: Hartford Acc. & Indem. Co. v. Delta & Pine Lumber Co., 169 Miss. 196, 150 So. 205 (1933), *rev'd*, 292 U.S. 143, *rehearing denied*, 292 U.S. 607 (1934); National Cas. Co. v. Mitchell, 162 Miss. 197, 138 So. 808 (1932); Standard Acc. Ins. Co. v. Broom, 111 Miss. 409, 71 So. 653 (1916); General Acc. Fire & Life Assur. Co. v. Walker, 99 Miss. 404, 55 So. 51 (1911).

[151] Miss. Code Ann. § 724 (1956).

[152] 13 G. Couch, *supra* note 9, § 49:4, at 635; *see* 8 J. Appleman, *supra* note 4, § 4735; 2 R. Long, *supra* note 9, § 13:19.

[153] 13 G. Couch, *supra* note 9, § 49:7, at 637; *see* 8 J. Appleman, *supra* note 4, § 4735; 2 R. Long. *supra* note 9, § 13:19.

[154] *See* 13 G. Couch, *supra* note 9, § 49:5.

California and Wisconsin, for example, have enacted statutes which provide that an insured has 20 days in which to give notice of an accident and which prohibit any stipulation limiting such notice period to less than 20 days;[155] Texas has a similar statute which prohibits a policy stipulation fixing the time for giving notice at less than 90 days.[156]

Mississippi also has a statute which has been held to apply to notice clauses.[157] This statute, however, is distinguished from those of other states in that it refers to the general statute of limitations[158] instead of establishing a specific limitation of a notice clause. The statute in question is one which is common to most other states in that it forbids any contractual change in the statute of limitations. The distinctive aspect of the Mississippi statute is the fact that the Mississippi courts have occasionally construed the statute to apply to notice clauses. In effect, the courts have said that notice provisions of insurance policies "change" the statute of limitations, by preventing the statute of limitations from ever being set in motion.[159]

In order to properly understand any discussion of this problem, the cases construing the intent and meaning of the statutes affecting notice should be reviewed.

Originally, Mississippi had no statute regulating notice provisions or the time for bringing suit, and any limitation on either was generally allowed.[160] However, the legislature adopted Section 2575 of the Mississippi Code of, 1906[161] which provided that: "No [insurance] company shall . . . limit the time within which such suit may be commenced to less than one year after the loss or injury, and any such condition or stipulation shall be void." In conjunction with this specific statute of limitation upon the insurance policies, the legislature adopted section 3127[162] prohibiting any change "whatsoever," of any statute of limitations and that ". . . any change in such limitation made by any contract stipulation whatsoever shall be absolutely null and void. . . ."

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[155] CAL. INS. CODE § 551 (West 1972); WIS. STAT. ANN. § 204.29 (1) (West 1957).

[156] TEXAS ANN. CIV. STAT. art. 5546 (Vernon's 1958).

[157] MISS. CODE ANN. § 724 (1956).

[158] *Id.* § 722.

[159] National Cas. Co. v. Mitchell, 162 Miss. 197, 138 So. 808 (1932); Standard Acc. Ins. Co. v. Broom, 111 Miss. 409, 71 So. 653 (1916); General Acc. Fire & Life Assur. Co. v. Walker, 99 Miss. 404, 55 So. 51 (1911).

[160] *See generally* Berry v. Lamar Life Ins. Co., 165 Miss. 405, 145 So. 887 (1933) (dissenting opinion).

[161] MISS. CODE OF 1906 § 2575.

[162] MISS. CODE ANN. § 724 (1956).

These statutes were first construed in *Dodson v. Western Union Telegraph Co.,*[163] in which the court held that a provision requiring suit to be brought within 20 days was violative of section 2575, which specifically related to insurance policies. The court, however, expressly reserved the question of the effect of the statute on the right of an insurance company to require that proof of loss[164] be given within a certain time.

The notice requirement was first considered in connection with the limitation statutes in *General Accident Fire & Life Assurance Co. v. Walker.*[165] There the court said a notice clause, requiring notice within 10 days after the accident, violated section 3127 as applied to section 2575. The court further said that any contract of insurance which undertakes to relieve the insurance company from full responsibility on its contract, by requiring notice to be given in less time than required by statute, is in conflict with section 2575. The giving of notice was considered to be nothing more than a preliminary step in the bringing of an action; and a limitation on this "step" was in effect a limitation on the bringing of the action itself.

A year after *Walker,* section 2575 was repealed,[166] leaving Mississippi with no statute prohibiting contractual time limitation on bringing suit under an insurance policy. The courts, however, continued to follow the reasoning of *Walker* in *Standard Accident Insurance Co. v. Broom,*[167] by holding that a notice clause violated the statute prohibiting a contractual change in the statute of limitations, notwithstanding the fact that there was no longer a specific statute limiting the time for bringing an action on an insurance policy. The court said that there was no essential difference between the general statute of limitations and the statute of limitations specifically referring to insurance policies. The statute prohibiting a contractual change in a statute of limitations applied to both.

In *National Casualty Co. v. Mitchell,*[168] the court continued to hold that a notice clause violated the statute prohibiting a contractual change in a statute of limitations when it held a clause requiring notice within 20 days to be invalid. In *Mitchell,* as in *Broom,* the court based its decision upon the theory that a notice clause, as a condition precedent to liability, prevented the statute of limitations from ever being set in motion, and in effect, "shortened" the statute by never allowing it to begin. The doctrine espoused in *Broom* and *Mitchell* [hereinafter cited as the *Broom* Doctrine] was upheld in the subsequent cases of *Standard Life & Accident Co. v. Fisher,*[169] and *Hartford Accident & Indemnity Co. v. Delta & Pine Lumber Co.*[170]

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[163] 97 Miss. 104, 52 So. 693 (1910).

[164] The courts normally speak of the requirement of the giving of proof in conjunction with the giving of notice. Therefore they will be considered as having the same effect for purposes of this comment.

[165] 99 Miss. 404, 55 So. 51 (1911).

[166] Miss. Gen. Laws [1912] ch. 223 at 296.

[167] 111 Miss. 409, 71 So. 653 (1916).

[168] 162 Miss. 197, 138 So. 808 (1932).

It appears from these cases that a provision of an insurance policy which shortens or changes a statute of limitations is void. Whether a notice clause is included as one of the prohibited provisions is still unclear. From an examination of the opinions of *Walker, Broom,* and *Mitchell,* it appears that the court is saying that notice does change the statute, and that notice clauses are therefore void. Yet how can these decisions be reconciled with those applying the general rules of notice,[171] making no mention of a conflict with the statute?

The only case in which the Mississippi Supreme Court has specifically addressed this question is *National Casualty Co. v. Mitchell.*[172] The court said it was not the intention of the court, in those cases which made no mention of the statute-clause conflict, to overrule or modify the doctrine as presented in *Broom.* Yet the court failed to give any reason why *Broom* controlled, or why the cases, which did not consider the statutes, were distinguishable. Thus the question was, and still is, unanswered, for after *Mitchell* the court never expressly considered this conflict.

A. The Broom Doctrine

Those who adhere to the belief that a notice clause shortens the statute of limitations argue that if a notice clause is construed as a condition precedent to liability, the clause limits the time in which an action can be brought, since the clause prevents the statute of limitations from ever being set in motion. This reasoning is based upon the logic that the statute cannot begin to run until liability accrues and since notice serves as a condition precedent to liability, liability never accrues if notice is not given.

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[169] 80 So. 347 (Miss. 1919).

[170] 169 Miss. 196, 150 So. 205, *rev'd,* 292 U.S. 143, *rehearing denied,* 292 U.S. 607 (1933). In *Hartford,* the court held a notice provision invalid which required notice to be given within 15 months of the loss. The court said that although the provision would be considered a mere limitation of liability in Tennessee, "The converse is true in Mississippi, and the provision . . . is a limitation of the action in this case; our statute of limitation being for six years." 169 Miss. at 205.

[171] *E.g.,* Harris v. American Motorist Ins. Co., 240 Miss. 262, 126 So. 2d 870 (1961); Hartford Acc. & Indem. Co. v. Hattiesburg Hardware Stores, 49 So. 2d 813 (Miss. 1951).

[172] 162 Miss. 197, 138 So. 808 (1932).

This argument was best presented in the dissenting opinions by Justice Anderson and Justice Griffith in *Berry v. Lamar Life Insurance Co.*[173] Justice Anderson said:

> The plain object of all such stipulations is to prevent the statute of limitations ever being set in motion. The statute cannot begin to run until a cause of action accrues, and under such a stipulation a cause of action never accrues. The result is the statute is just done away with. The limitation fixed in such a stipulation for notice, or notice and proof, is the only limitation. The statute says that limitation cannot be fixed by contract.[174]

In addition, Justice Griffith said:

> Substance, and not shadowy distinction should control the decisions of the courts. It seems that all might agree on that. In my opinion, there is only a technical or shadowy distinction between a policy of insurance which provides by its express terms, and to which the parties have freely assented, that it shall be a condition precedent to liability that notice and proof shall be given, and a policy such as the one here before us wherein the provisions are that the company will be liable if and when the notice is given. In either case, the substance of the stipulation is that there shall be no liability unless and until notice is given. But under the language of most of these policies this court has been holding that the stipulation providing that there shall be no liability in the absence of a precedent notice and proof is in contravention of the statute of limitations, and now in this case the majority holds that a stipulation meaning the same thing but in a different arrangement of words does not come within the statute. The decision of the majority makes it possible and hence probable that insurance companies will adopt the language which is found in this policy; will make notice a condition precedent to liability, but in doing so will use the same phraseology or arrangement of words which are found in this particular policy, and thereby evade the statute and the long line of decisions that has heretofore supported the statute.[175]

B. Abandonment of the Broom Doctrine

The preceding arguments were presented in *Walker, Broom,* and *Mitchell* to justify the court's holding that the notice clauses in those cases were void. Since *Mitchell* there have been numerous cases construing the notice clause according to the general rules of notice, that is, prejudice, excuse, etc.,[176] yet no case has held that a notice clause violated the statute of limitations. The only recent case upholding either doctrine dealt with an insurance policy specifically limiting the time for bringing an action.[177] Notice was not involved. Thus, it appears that the *Broom* doctrine, as applied to notice, has been abandoned. It is submitted that: (1) where notice is considered to be a condition precedent to liability, the court will hold that it does not effect the statute of limitations, and (2) where notice is not considered to be a condition precedent to liability, the court will also hold that the notice requirement does not effect the statute of limitations, since lack of notice is no longer fatal to recovery.

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[173] 165 Miss. 405, 145 So. 887 (1933) (dissenting opinion).

[174] *Id.* at 428, 145 So. at 891.

[175] *Id.* at 428-29, 145 So. at 892.

1. Where notice is a condition precedent

Although there is scant authority for either an affirmation or rejection of the *Broom* doctrine where notice is considered to be a condition precedent to liability, there are several cases which indicate a break or abandonment of the doctrine.

The first indication is found in a line of cases involving notice of loss or disability in life insurance policies in which the court held that the notice limitation, although a condition precedent to liability, does not affect the statute of limitations.[178] The cases involved policies in which an insured was required to give notice of disability within a certain time after the occurrence of the disability and before he reached a certain age.

The court's position on such policies was best presented in *Berry v. Lamar Life Insurance Co.*,[179] in which it said that the insurance company's obligation did not rest upon the receipt of proof (notice) of disability. In *Berry,* liability was held to accrue not on the occurrence of the disability, but on the receipt of notice of the disability. Notice was therefore held to be a condition precedent to liability, having no effect upon the statute of limitations, since the statute had not begun to run.

This logic was followed in numerous other cases involving the same type of insurance. In the case of *Mutual Life Health & Benefit Insurance*

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[176] Note 171 *supra.*

[177] Latham v. United States Fidelity & Guar. Co., 267 So. 2d 895 (Miss. 1972).

[178] Mutual Benefit Health & Acc. Ass'n v. Winter, 209 Miss. 344, 46 So. 2d 803 (1950); Metropolitan Life Ins. Co. v. Lindsey, 184 Miss. 359, 185 So. 573 (1939); Berry v. Lamar Life Ins. Co., 165 Miss. 405, 145 So. 887 (1933); Mutual Life Ins. Co. v. Hebron, 166 Miss. 145, 146 So. 445 (1933); New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93 (1920).

[179] 165 Miss. 405, 145 So. 887 (1933).

Co. v. Winter,[180] the court held that the fact that due proof or notice was considered to be a condition precedent to liability does not abridge the 6-year statute of limitations. "It simply means that the statute does not begin to run until proof [notice] is made—which is the period at which the cause of action accrues."[181]

In the cases following the *Berry* logic, the court held that notice did not violate the statute of limitations because it was a condition precedent to liability. However, this was the very reason that the court had earlier said that the statute of limitations was violated.

In *Aetna Life Insurance Co. v. Walley,*[182] the court also rejected the theory that notice violated the statute of limitations. However, this case involved a different type of insurance than in the cases following the *Berry* logic. Yet the same reasoning was used to hold that a requirement of prompt notice did not violate the statute prohibiting a contractual change in the statute of limitations. As in *Berry,* the court held that the requirement of notice was considered to be a condition precedent to liability, and that a notice limitation could not shorten the statute of limitations, since the insurer's liability could not accrue until the injured party's suit against the insured had been terminated.

James Appleman[183] and Robert Long,[184] two leading authorities on the law of insurance, imply that this case is authority for the fact that Mississippi no longer has a conflict between the notice clause and the statute.

There may be, however, better authority for such a conclusion. In the dissenting opinions of *Berry v. Lamar Life Insurance Co.,*[185] Justice Anderson and Justice Griffin stated that they could not distinguish the disability notice cases, where a requirement of notice was not held to be in violation of the statute, from those cases where notice was held to be in violation of the statute. An examination of these cases shows that in effect there is no real difference in the clauses, for the clauses in the disability cases, and those in *Walker, Broom,* and *Mitchell,* have the same effect — they all shorten the statute by preventing it from being set in motion. It is hard to discern how the court could have seen a difference in the effect of the clauses. Perhaps it was at this point the court changed its position as to the effect of notice, and impliedly overruled its holdings in *Walker, Broom,* and *Mitchell.* Although Justice Anderson and Justice Griffith could not persuade the majority to see the similarities in the cases, they may have shown where the *Broom* doctrine, as applied to notice clauses, was impliedly overruled.

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[180] 209 Miss. 344, 46 So. 2d 803 (1950).

[181] *Id.* at 352, 46 So. 2d at 805, *quoting the court in* Metropolitan Life Ins. Co. v. Lindsey, 189 Miss. 600, 198 So. 282 (1940). In *Winter,* however, the court suggested a point on which it might be argued that the line of cases following *Berry* might be distinguishable from those construing general liability insurance policies. The court said that in the line of cases construing the notice of disability provisions in this type of insurance, there were "distinct antecedent prerequisites" peculiar to this type of case and that the cases are distinguishable and the line of reasoning that notice is a condition precedent to liability and does not violate the statute, would not apply to other types of insurance. This argument could probably be rebutted, however, with *Aetna Life Insurance Co. v. Walley,* 174 Miss. 365, 164 So. 16 (1935), and the logic presented by the dissenters in *Berry* (as presented in the textual material).

[182] 174 Miss. 365, 164 So. 16 (1935).

[183] 8 J. Appleman, *supra* note 4, § 4735, at 40.

[184] 2 R. Long, *supra* note 9, § 13:19, at 13-52.

[185] 165 Miss. 405, 145 So. 887 (1933) (dissenting opinion).

2. Where notice is not a condition precedent

Even if it is admitted that the court has changed its position as to the effect of the statute upon the notice requirement, where notice is considered a condition precedent to liability, the question still exists as to the effect of notice where it is not held to be a condition precedent to liability. Apparently the only way to determine what the effect would be is to analyze the notice clause in relation to the prejudice rule, for there is no case specifically considering this question.

In those jurisdictions, including Mississippi, where notice is held to be a condition precedent to liability, failure to meet the notice requirement (in the absence of a forfeiture clause) does not bar recovery unless prejudice results to the insurer. Therefore, delay or failure to give notice is not fatal per se. It merely serves to postpone recovery until notice is given, and is a condition precedent to the bringing of an action rather than a condition precedent to liability. Therefore, a limitation upon the giving of notice does not "shorten" the statute of limitations because, technically, the notice requirement no longer has any effect. In practice, the prejudice rule has destroyed the effect of a notice clause, for the clause is no longer binding upon the insured.

VII. CONCLUSION

Prompt notification of an accident or loss is extremely important to an insurance company, yet the Mississippi law surrounding the provisions providing for this notice is oftimes complex and confusing. As a rule, Mississippi follows the general rules of law regarding notice clauses, but its position as to the prejudice rule and the effect which its statutes have upon the clauses are two areas which need to be thoughtfully considered by the court.

In the past, the courts have been extremely liberal in their application of the prejudice rule, so much so, that they may have misconstrued the test used to determine the reasonableness of a delay. It appears that the courts considered only whether the insurer was prejudiced from the delay. If there was no apparent prejudice it would hold that the delay was reasonable. If this be the case, the court is misapplying its own stated interpretation of the prejudice rule (that prejudice is to be considered as only one of the factors in determining the reasonableness of the delay), and has extinguished any value which a notice clause might have to the insurer. The only protection which the insurer now has is to show, by actual evidence, that he was prejudiced by the delay. Yet, because of the nature of the prejudice suffered, and because the courts generally construe an insurance policy in favor of the insured, this protection is illusory.

The relation between the Mississippi statutes and the notice provisions, and the effect which these statutes have upon notice is also an area in great need of clarification. There is a line of cases in Mississippi which, in effect, holds that any notice provision requiring prompt notification is void as being in conflict with the statute prohibiting contractual change in the statute of limitations. This line of cases apparently is still good law, for these cases have never been expressly overruled. These cases are inconsistent with other decisions as to the effect of notice clauses and unless clarified by the court, could produce troublesome and perhaps irreconcilable problems not only for attorneys but also for the courts.

The law surrounding notice clauses has not been considered by the Mississippi court in recent years and, therefore, is based primarily upon old case law. Should the court be faced with a notice problem, it should reexamine its position as to prejudice taking into consideration the ramifications of each argument, and the equities as to both parties. In addition, the court should rectify the conflict in the case law as to the effect of the Mississippi statutes upon notice requirements.

Such a re-evaluation would do much towards rectifying a confusing, and oftimes, harsh body of law.

George R. Fair

OIL AND GAS WELL OPERATOR'S LIABILITY TO LESSOR-SURFACE OWNER FOR SLUSH PIT OVERFLOW OR SEEPAGE

Since the discovery of the Tinsley oil field in Yazoo County in 1939, Mississippi has been a major oil and gas producing State. The state treasury and the mineral owners have prospered because of this production, and the nation, now apparently on the verge of an energy crunch, certainly has benefited as well. However, incidental to the profitability of this production are, necessarily, problems – not the least of which is damage to the surface and waters of the State caused by the outpouring of deleterious effluents from well sites. Indeed, one writer has written that, while it is a relative latecomer to oil and gas production, Mississippi has already built up an extensive amount of case law on the subject of surface damages.[1]

Often in producing petroleum, a well also yields salt water. Normally oil, gas, and saltwater are trapped together in sand beneath the surface of the earth. When this salt water reaches the surface, the operator separates it from the petroleum and stores it in a pit at the well site or pumps it back into the ground. Such pits also contain drilling muds and chemicals needed in the production process. These pits are commonly referred to as slush pits.[2]

The legal problems to be discussed in this comment are those between the oil and gas operator, and surface owners and tenants whose property is damaged by seepage and outpourings from these slush pits. The present state of the law in Mississippi will be discussed, and recommendations for the further development of this area of law will be offered.

THE DOMINANT-SERVIENT RELATIONSHIP

Normally oil and gas operations are carried out on surface land, the subsurface mineral rights to which have been leased to the operator. The mineral rights have usually been leased by the mineral owner, or owners, a group which may or may not include the surface owner.[3]

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[1] Jones, *The Oil Operator and Surface Damages,* 4 NATURAL RESOURCES LAW. 339, 340 (1971).

[2] For the purposes of this comment the term "slush pit" will encompass not only pits that are used to confine drilling mud and chemicals, but also waste oil and salt water. The courts in Mississippi have not recognized the fact that one pit contains muds and chemicals and another salt water as material to the issue of liability. While the scope of this paper does not include subsurface salt water disposal, it appears the same legal principles as to surface pits are applicable.

The granting clause of the oil and gas lease states the purpose of the lease and gives the lessee the right to reasonably use the surface to accomplish this purpose.[4] While modern leases are fairly detailed in spelling out the rights of the lessee in exploring for and producing petroleum, it has long been the rule in the majority of jurisdictions that the lessee has, by implication, the rights to do whatever is necessary to accomplish the purpose of the lease, whether or not the act is expressly provided for in the lease.[5] The law in Mississippi is no different.[6]

This holding of the implied right to use the surface creates a special relationship between the lessor and lessee — the dominant and servient estates. The lessee's severed mineral estate is in a dominant position to the surface estate. The only limitation on the dominant estate is that it be used reasonably in pursuit of its stated purpose and in due regard of the servient estate.[7]

The oft-cited case of *Grimes v. Goodman Drilling Co.*[8] illustrates emphatically the dominance of the lessee's estate. In that case the plaintiff had purchased a house on property of which the minerals had been granted to defendant operator by plaintiff's grantor, who had retained all royalty. The defendant drilled a well in Grimes' front yard so near the house that the plaintiff could only enter his home through the rear door. Further, incidental to the well was a slush pit full of oil and salt water close enough to the house that the windows and doors on one side of the house were kept shut because the effluents in the pit splashed against the side of the house. The court refused to grant an injunction against the drilling company in order to abate the nuisance on Grimes' property. The Texas Court of Civil Appeals laid the plaintiff's appeal to rest by saying: "As appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees, such as are usual and customary during the drilling of an oil well."[9] Of course, today's well-spacing requirements and express lease provisions that state that no well will be drilled within 200 feet of a house[10] insure that a modern Mr. Grimes would be protected from such a condition. This is no evidence, however, that, save these external developments, the dominance of the lessee's estate is diminished from that possessed by Goodman Drilling Co.

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[3] Inasmuch as mineral rights in Mississippi are fully severable from the surface estate, the operator himself may be the owner of the mineral interests; however, this is infrequently the case.

[4] 4 W. SUMMERS, THE LAW OF OIL AND GAS § 652, at 6 (1962) [hereinafter cited as SUMMERS].

[5] *Id.* at 7.

[6] Comment, *Use of the Surface Fee by the Mineral Operator,* 32 MISS. L.J. 104 (1960). *See* Gulf Ref. Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955); McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945).

[7] Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner,* 8 ROCKY MT. MINERAL L. INST. 315 (1963); McMahon, *Rights and Liabilities with Respect to Surface Usage by Mineral Lessees,* SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 231 (1955); Scott, *Oil and Gas Lease Clauses Relating to Surface Damage and the Use of the Surface,* 13 ROCKY MT. MINERAL L. INST. 317 (1967); Jones, *supra* note 1, at 340; Comment, *supra* note 6, at 105.

[8] 216 S.W. 202 (Tex. Civ. App. 1919).

Because of the existence of the dominant-servient relationship of the estates of the lessor and lessee, it is necessary to consider separately the operator's liability to adjacent surface owners and the owner or tenant of the surface upon which the well is located.

LIABILITY TO ADJACENT SURFACE OWNERS

There being no special relationship between the operator and an adjacent land owner or surface tenant, the operator may be liable for damages to members of this class under several theories of recovery.[11] In Mississippi these theories include negligence,[12] intentional tort,[13] nuisance without proof of negligence,[14] and negligence per se.[15]

Tort liability based on the theories of negligence and intentional feasance are so commonplace in tort law as to make unnecessary any discussion here of the reasoning behind their acceptance in slush pit cases. However, it is worthwhile to note that punitive damages will lie where the outpouring of deleterious effluents is intentionally caused. In *Richardson v. Byrd*[16] a landowner, whose property was adjacent to the land on which Richardson's well sat, noticed a bulldozer was breaking the wall around the well's slush pit. Byrd, the plaintiff, went home, got his camera, and took pictures of the bulldozer breaking the dam and pushing the effluents out. The trial court allowed to stand the jury's finding, based on evidence including 12 of Byrd's color photographs, that the damage was done intentionally and that nearly $1400 in punitive damages was appropriate. The Mississippi Supreme Court affirmed the decision, stating:

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[9] *Id.* at 204.

[10] Scott, *supra* note 7, at 348-49.

[11] SUMMERS § 655, at 59.

[12] *See, e.g.,* Jett Drilling Co. v. Jones, 251 Miss. 332, 169 So. 2d 463 (1964); Magnolia Petroleum Co. v. Stinson, 230 Miss. 533, 93 So. 2d 815 (1957); Magnolia Petroleum Co. v. Williams, 222 Miss. 538, 76 So. 2d 365 (1954).

[13] *See, e.g.,* Richardson v. Byrd, 215 So. 2d 424 (Miss. 1968).

[14] *See, e.g.,* Blue v. Charles F. Hayes & Associates, 215 So. 2d 426 (Miss. 1968); Love Petroleum Co. v. Jones, 205 So. 2d 274 (Miss. 1967); Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963).

[15] *See, e.g.,* Ginther v. Long, 227 Miss. 885, 87 So. 2d 286 (1956).

[16] 215 So. 2d 424 (Miss. 1968).

> [P]unitive damages may be recovered . . . where the wrongful act complained of is characterized by some circumstances of aggravation, such as willfulness, wantonness, malice, gross negligence, recklessness, oppression, contumely, indignity, outrageous conduct, insult, or gross fraud.[17]

Of the several reported cases in which the liability of the operator for damage by outpouring from his slush pit has been based on nuisance, the most informative is *Blue v. Charles F. Hayes and Associates, Inc.*[18] In that case Blue and his wife had leased the minerals under a portion of their lands to defendant oil company. The company brought in first one, then another, producing well – Blue numbers 1 and 2. Soon the slush pit of Blue number 1 overflowed when one of its embankments broke. The oil, salt water, drilling mud, and chemicals from the pit ran out, not only over the leased premises, but also onto Blue's "adjoining forty." Blue filed suit in the Circuit Court of Jones County alleging a cause of action in trespass. Defendant demurred, and his demurrer was sustained. But the Mississippi Supreme Court reversed and remanded the case, finding that the plaintiff had stated a cause of action in nuisance. The court said:

> The declaration of complaint in an action for damages for a nuisance must allege facts sufficient to state a cause of action in conformity to the general rules of pleading. It must show the existence of a nuisance, but it is not necessary to use the words 'nuisance' if the facts alleged disclose a nuisance.[19]

The fact that Blue did not know the difference between a nuisance and a trespass is immaterial. Mississippi recognizes the liability of the operator "for permitting waste to flow upon the land of another upon the theory of nuisance."[20] Notice that Blue is considered in the status of an adjacent landowner because the damage sued for was on his unleased surface.

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[17] *Id.* at 425.

[18] 215 So. 2d 426 (Miss. 1968).

[19] *Id.* at 429, *quoting* 39 AM. JUR. *Nuisance* § 142 (1942).

[20] *Id.* Ironically, Blue was eventually to lose the case. On remand, he was successful, but the defendant appealed. The supreme court reversed and rendered a verdict for the operator, apparently on the grounds that Blue's attorney had failed to file an appellate brief! 233 So. 2d 127 (Miss. 1970).

As was stated earlier, plaintiff may recover based on the theory of negligence. However, plaintiff may plead negligence and, failing in his proof, recover in nuisance. This is clearly the ruling of the supreme court in *Central Oil Co. v. Shows.*[21] In reversing the adverse ruling of the trial court and rendering judgment for plaintiff Shows, the court said if negligence "is alleged it need not be proved."[22]

Summers in his treatise contends that Mississippi recognizes liability to adjoining surface owners on the theory of negligence per se, based on a reading of *Ginther v. Long.*[23] However, in Mississippi it is not necessary to allege negligence per se based on violations of a statute or regulation, since defendants are strictly liable for damages to adjacent surface owners under this state's nuisance theory. Neither negligence, nor violation of statute, nor intent, nor any other fault on the operator's part need be pled or proved. If the existence of the nuisance is proved, the operator must pay proven damages, or nominal damages if none are proven. Of course, it should be noted, an oil well or a slush pit is not a nuisance per se.[24]

The defendant oil and gas producers now have no defense as to the issue of liability in suits by adjacent surface owners or tenants for slush pit damages. The court in *Blue v. Charles F. Hayes and Associates, Inc.*[25] apparently laid to rest any contention that the damages are *damnum absque injuria.* Certainly that medieval notion has no place in today's world.

Before discussing the situation as to mineral lessors, and owners and tenants of the surface upon which the well is located, it should be noted that adjacent surface owners are not home free in suits against well operators. Proof of causation and damages leaves the producers plenty of ring in which to fight.[26]

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[21] 246 Miss. 300, 149 So. 2d 306 (1963).

[22] *Id.* at 310, 149 So. 2d at 311. Unfortunately for Mr. Shows, the court also found he had proved no damages and entered judgment in his favor in the amount of $50.

[23] 227 Miss. 885, 87 So. 2d 286 (1956). In *Ginther,* plaintiff's land was allegedly damaged in violation of regulations of the Oil and Gas Conservation Agency. However, the defendant admitted liability, so the question of whether he was liable under certain pollution statutes was never argued. *Id. See* SUMMERS § 655 n.60, at 68.

[24] SUMMERS § 654, at 54-55. By implication of the production of oil and gas being a lawful business, Mississippi recognizes this principle. Although there is no reported Mississippi case to that effect, Texas, whose lead we have faithfully followed in this area of law, does have such a ruling. Domengeaux v. Kirkwood & Co., 297 S.W.2d 748 (Tex. Civ. App. 1957).

[25] 215 So. 2d 426, 428 (Miss. 1968).

LIABILITY TO SURFACE TENANTS

Prior to viewing the application of this area of the law to the overlying surface owner, the relationship of the landowner's surface lessee to the mineral lessee should briefly be considered.

While the writers seem to agree that the relationship of the surface lessee to the mineral lessee presents a troublesome question, they are split as to the answer to that question. Some feel that a surface lessee whose lease is prior to that of the mineral lessee and who is in possession of the surface has an estate dominant to that of the mineral lessee.[27] Others reason that a surface lease is no more than a severance of the mineral and surface estates, having the same effect as a grant of the surface fee with a total reservation of the mineral rights. Such a grant leaves the severed surface estate servient to the mineral estate and, hence, mineral lessee's estate.[28] Their argument seems to be based on the Texas case of *Phillips Petroleum Co. v. Cargill.*[29] The latter group's logic may be appropriate, but their authority is weak. Even as one of the proponents of the mineral estate being dominant admits, Cargill's lease was on a year-to-year basis and, therefore, at the end of the year after the mineral lease was executed, the mineral lease became first in time as the surface tenant had a new lease. A similar holding, *Robinson Drilling Co. v. Moses,*[30] never considered such a premise.[31] Despite this disagreement as to the law in Texas, it is universally agreed that Oklahoma recognizes the dominance of the prior surface lessee based on *Mikel Drilling Co. v. Dunkin*[32] and *Republic Natural Gas Co. v. Melson.*[33]

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[26] Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963) (plaintiff failed to prove damages); Magnolia Petroleum Co. v. Williams, 222 Miss. 538, 76 So. 2d 365 (1954) (plaintiff unable to prove causation because of multiplicity of operators in area). Causation is especially difficult to prove in cases involving damage to or pollution of water wells, which is a common problem.

[27] McMahon, *supra* note 7, at 236; Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 5 (1956); Comment, *supra* note 6, at 113.

[28] Davis, *supra* note 7, at 320-25; Sellers, *How Dominate Is the Dominant Estate? Or, Surface Damages Revisited,* THIRTEENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 377, 396-97 (1962); Jones, *supra* note 1, at 140.

[29] 340 S.W.2d 877 (Tex. Civ. App. 1960).

[30] 256 S.W.2d 650 (Tex Civ. App. 1953).

[31] *See* McMahon, *supra* note 7, at 237.

[32] 318 P.2d 435 (Okla. 1957).

[33] 274 P.2d 543 (Okla. 1954).

While Mississippi usually adopts the Texas view, the present disagreement as to what that view is may lead to a holding in accord with an established principle such as that of Oklahoma.

If this State does decide that prior surface tenants in possession have the dominant estate, the operator will be strictly liable to the tenant for all damages, regardless of any other considerations. It is doubtful, however, that the operator may be kept off the property altogether, as is suggested by Dean Keeton in the first of his articles on the subject in the Texas Law Review.[34]

It seems universally accepted that the subsequent surface lessee's estate is servient to that of the prior mineral lessee.[35] A subsequent surface lessee is in exactly the same position as the surface owner.

LIABILITY TO THE MINERAL LESSOR OR OVERLYING SURFACE OWNER

While the operator is, for all practical purposes, strictly liable on the basis of nuisance for any damages to adjacent landowners' property by seepage or overflow from his slush pit, Mississippi has yet to recognize an absolute-liability principle on behalf of the holder of the servient estate.

From a reading of the cases it appears the only concept of tort liability available to the overlying surface owner is negligence,[36] unless an intentional act on the operator's part caused the damage.[37]

Professor Summers states the generally accepted principle of liability in his treatise, as follows:

> In the absence, however, of a statutory or contractual duty on the part of the lessee to prevent salt water or waste oil from flowing over the surface, or requiring that such substances be confined and fenced, a surface owner alleging injury to his property has the burden of proving the lessee's negligence was the cause of the injury.[38]

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[34] Keeton & Jones, *supra* note 27, at 5. *See* Comment, *supra* note 6, at 113. Certainly a veto power by a prior surface lessee is unacceptable. *See* Davis, *supra* note 7, at 324-25.

[35] *See, e.g.*, Keeton & Jones, *supra* note 27, at 5-6.

[36] Placid Oil Co. v. Byrd, 217 So. 2d 17 (Miss. 1968); Cities Service Oil Co. v. Corley, 197 So. 2d 244 (Miss. 1967); Dapsco, Inc. v. Reynolds, 254 Miss. 111, 180 So. 2d 319 (1965); Sun Oil Co. v. Nunnery, 251 Miss. 631, 170 So. 2d 24 (1964); Gulf Ref. Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955).

[37] Chisolm v. Walters, 253 Miss. 154, 175 So. 2d 189 (1965).

[38] SUMMERS § 652, at 38-40.

Before considering the effect of the exceptions to the general rule, which constitutes the law in Mississippi, it is proper to discuss the negligence standard.

The dominant-servient relationship is the root of the negligence standard. So long as the operator reasonably uses the surface estate, in due regard of the surface owner's rights, to accomplish the purpose of the lease, he cannot be liable to the surface owner, save by violation of statute or express lease provision.[39] The natural extension of this principle is the above stated rule concerning liability for slush pit caused damages. The surface owner grants the right to the lessee to come on his land and explore for and produce oil and gas. The court has determined that, in doing so, the landowner agrees to let his land and water be destroyed by deleterious effluents so long as this destruction is not caused by the operator's negligence.[40] After all, the lessor does have the right to keep the dirty, old oil wells off his property by not granting the mineral lease.

To determine if this good logic is good law, one must fully understand the avenues of recovery available to the mineral lessor-surface owner.

In *Sun Oil Co. v. Nunnery*[41] the Mississippi Supreme Court defined the standard for determining negligence:

> Sun had the unquestioned right to do whatever was reasonably necessary to develop the Nunnery land, including clearing the location, without liability for the resulting damage. Although this is a negligence action, the case grows out of the relationship of lessor and lessee and whether Sun was negligent is measured by the external standard of the prudent operator rule which this Court recognizes as the broad standard in cases of this kind.[42]

The prudent operator is, of course, the principle of the dominant-servient estate (reasonable use and due regard) couched in the tort terminology of the reasonably prudent man imputed with the knowledge of the ordinary oil and gas well operator. He (the prudent operator) is subject to having at least as much knowledge of oil and well technology as the ordinary operator, including ability to foresee and anticipate damages likely to occur because of his operations. He must, in the best feasible manner, protect his lessor against such damages, even if ordinary business custom in the area does not accomplish such protection. Otherwise, he is liable for any damage caused by his failure to provide protection against these dangers.[43]

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[39] *See* note 6 *supra*.

[40] Keeton & Jones, *supra* note 27, at 3.

[41] 251 Miss. 631, 170 So. 2d 24 (1964).

[42] *Id.* at 645, 170 So. 2d at 31.

Proof of violation of the prudent-operator rule as it is interpreted by the Mississippi court can be difficult and expensive for the plaintiff landowner. Negligent construction and negligent maintenance[44] of the pit are grounds for liability. Plaintiff must carry the burden of proof as to what constitutes negligence in construction and maintenance; then he must show that the defendant operator failed to meet this standard. Moreover, unless the causes of the damage are such that the court may take judicial notice, the plaintiff must provide expert testimony to define the standard and to show where the operator failed to meet that standard.[45] This presents the plaintiff with an imposing task.

While logic may dictate that any pit which leaks, overflows, or breaks was either negligently constructed or maintained, the Mississippi Supreme Court, by implication, has denied such an interpretation. In the case of *Gulf Refining Co. v. Davis*,[46] which still represents the law in this jurisdiction, the court, after accepting as uncontroverted that effluents from defendant's pit had poured out over Davis' land, said: "[T]here was an issue for the jury as to whether or not defendant *negligently* permitted salt water to seep or overflow onto the plaintiff's land. . . ."[47]

At one point the supreme court seemed prepared to move away from this view. In 1962 the case of a Jasper County landowner, Webber Gatlin, went before the court. Gatlin had won a verdict in circuit court based on the theory that the pit was negligently constructed. In affirming, Justice Arrington, speaking for the court, never mentioned the matter of negligent construction. Instead, he said: "Clearly, the appellants were guilty of negligence in leaving the slush pit with the potential poisons therein. They could reasonably foresee that the dam might break with such consequence as have been shown to result."[48] Unfortunately, this principle has not been heard of since. Something more than the fact of the outpouring must be proved to establish negligence.

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[43] *See generally* Keeton & Jones, *supra* note 27, at 12-15.

[44] Negligent maintenance for the purposes of this comment, not only includes failure to properly maintain the embankments surrounding the pit, but also permitting the pit to be filled above capacity.

[45] Keeton & Jones, *supra* note 27, at 16-17.

[46] 224 Miss. 464, 80 So. 2d 467 (1955).

[47] *Id.* at 469 (emphasis added); *accord,* Placid Oil Co. v. Byrd, 217 So. 2d 17 (Miss. 1968). For a fuller discussion see Cities Service Oil Co. v. Corley, 197 So. 2d 244 (Miss. 1967); Dapsco, Inc. v. Reynolds, 254 Miss. 111, 180 So. 2d 319 (1965); Sun Oil Co. v. Nunnery, 251 Miss. 631, 179 So. 2d 24 (1964); Warren Petroleum Corp. v. Martin, 271 S.W.2d 410, (Tex. 1954).

[48] Broadhead v. Gatlin, 243 Miss. 386, 388, 137 So. 2d 909, 911 (1962).

Perhaps that fact that Gatlin was an adjacent landowner and not in a dominant-servient relationship with the operators of the well is the basis for Justice Arrington's statement never having been further utilized. Although operators are strictly liable to adjacent landowners under nuisance, *Broadhead v. Gatlin* is not a nuisance case; no mention is made of nuisance. The plaintiff pled and proved negligence to the satisfaction of the jury, the trial court, and the supreme court. If the operator's actions are negligent as to the adjacent landowner in this type of case, the dominant-servient relationship does not keep the same action from being negligence as to the overlying surface owner or the lessor. However, Mississippi has never accepted such a view.

Possible Alternative Theories of Recovery for the Overlying Surface Owner

While the negligence standard is still the law of this jurisdiction, there are chinks in the dike. In 1968 the Mississippi Supreme Court, in *Larco Drilling Corp. v. Lee,*[49] deviated from the rule that overlying surface owners or users, even though not the mineral lessor, possess an estate servient to the mineral estate. Mr. and Mrs. J. C. Lee owned a 10-acre tract of land from which the mineral estate had been severed. The minerals were under lease to Sun Oil Co., for whom Larco was drilling a well.[50] After the Lees' land was damaged by an outpouring of effluents from defendant's slush pit, they filed suit. The plaintiffs offered no evidence that Larco was negligent.[51] Nevertheless, the supreme court "followed what the court did in *Shows,*"[52] a nuisance case involving an adjacent landowner, and though allowing Lee to recover only nominal damages because of failure to show damages, predicated the operator's liability on the theory of strict liability under nuisance.

The court, despite its ruling to that effect, did not expressly find the negligence standard and the dominant-servient relationship to be inapplicable to overlying surface owners who were not the mineral lessors. Hopefully, the result of the case will be positively stated in a future case, and the principle will become the law in this state. This would be a step in the right direction.

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[49] 207 So. 2d 634 (Miss. 1968).

[50] It is accepted in Mississippi that the lessee is liable for the actions of the operator who is employed by him to drill the well. The same applies for contracted pumpers or drillers. Dapsco, Inc. v. Reynolds, 251 Miss. 111, 180 So. 2d 319 (1965).

[51] 207 So. 2d 634, 635 (Miss. 1968).

[52] *Id., citing* Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963).

The lessor-surface owner would not be aided by the acceptance of the ruling in *Larco Drilling Co. v. Lee.* There are, however, three possible alternatives open to him in lieu of pleading and proving negligence.

The most obvious alternative theory of recovery sounds in contract. That is, the defendant is liable because he violated an express clause of the mineral lease. It is becoming increasingly prevalent for leases to contain a clause concerning the type of damages discussed in this comment.

The clause, which will be of assistance to the lessor in recovering for damages caused by slush pit overflow, usually says, "The Lessee shall pay all damages caused by Lessee's operations hereunder to growing crops or timber on the land."[53] Therefore, *any* damage done by the operator, regardless of negligence, to the growing crops or timber will be paid for, if causation is proved.

Once causation and damages have been proved, only one problem remains. What is a growing crop?

There is no question that growing crops include annual crops, which are planted and grown for domestic use or profit.[54] Whether perenial plants and natural grasses are growing crops within the scope of the provision would be a question of first impression in Mississippi. A sound rule to follow was established by the Oklahoma Supreme Court. They held that crops such as lespedeza, clover, legumes or grasses, which are seeded, whether growing annually or perennially, to be used as pasturage, meadow, or for seed crop purposes, are growing crops protected by the provision. Natural grass used for grazing is not so protected.[55]

Regardless of the interpretation of how much the term "growing crops" encompasses, the lessor is offered some relief from the negligence principle by this lease provision. It is appropriate to note that the Mississippi Supreme Court has held that this provision does not protect against damage to the soil or its productivity.[56]

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[53] Oil and Gas Lease, *Mississippi Producers 88 A-Unit,* Form 13-292-S, § 3, para. d, (rev. 12-1-52). Similar provisions are found in Oil, Gas, and Mineral Lease, *Producers 88* (rev. 9-70) and Oil, Gas, and Mineral Lease, *Mississippi Producers 88 Rev.,* Form 0-279 (rev. 8-65).

[54] Davis, *supra* note 7, at 341; Sellers, *supra* note 29, at 383.

[55] Superior Oil Co. v. Griffin, 357 P.2d 987 (Okla. 1960); *accord,* Frankfort Oil Co. v. Abrams, 413 P.2d 190 (Colo. 1966). *See* Scott, *supra* note 7, at 342-45.

[56] Transcontinental Gas Pipe Line Corp. v. Hill, 57 So. 2d 162 (Miss. 1952).

It is also proper to differentiate this provision from a common provision that states, "Lessee shall be responsible for all damages caused by Lessee's operations hereunder other than damages necessarily caused by exercise of the rights herein granted."[57] This provision is no more than a restatement of liability under the dominant-servient relationship of estates. It does not extend the lessor's ability to recover beyond the negligence standard.

Another avenue of recovery by the lessor that is apparently available would completely overcome the dominant-servient relationship. It is the tort theory of negligence per se. Like proof of the violation of an express lease provision, proof of the violation of a statute prohibiting the outpouring of deleterious effluents defeats the negligence standard and establishes liability without proof of negligence. Mississippi has had such a statute since 1956. This statute, which denominates the powers of the State Oil and Gas Board of Mississippi, states:

> The [oil and gas] board shall have the authority, and it shall be its duty, to make . . . rules, regulations and orders for the following purposes: (1) . . . to prevent the pollution of fresh water supplies by oil, gas or salt water; . . . to prevent seepage, overflow or any irreparable damage or injury to the topsoil or surface . . . [by mud, acids, salt water or any corrosive products brought to the surface by an oil well.][58]

There is no recorded case in Mississippi in which a plaintiff has sought recovery by claiming negligence per se based on this statute.[59]

As was earlier mentioned, Professor Summers cites the case of *Ginther v. Long*[60] as authority that Mississippi has allowed recovery for damages in a surface-damages case based on the theory of negligence per se. In this instance, it is contended, Summers is incorrect. Actually, the defendant attempted to use as a defense a certificate from the Game and Fish Commission stating that defendant was in compliance with their water pollution regulations.[61] Defendant contended that, inasmuch as the commission certified its compliance, no pollution in fact existed. Neither the jury nor the supreme court accepted such a rationale, and Long succeeded in recovering damages based on Ginther's willfully allowing deleterious effluents to run on his property.

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[57] Oil, Gas, and Mineral Lease, *Producers 88-D-9803,* § 7 (rev. 10-1-48). A similar provision is found in Mineral Lease, *Mississippi Form 3238-E.*

[58] MISS. CODE ANN. § 53-1-17 (c) (1) (1972).

[59] The statute was passed as Act of April 5, 1956, ch. 163, [1956] Miss. Gen. Laws 165. It was codified under the 1942 Code as section 6132-10. In 1970 the legislature amended it to make provision for cooperation between the State Oil and Gas Board of Mississippi and the Mississippi Air and Water Pollution Control Commission but left the basic language intact. It is carried over to the new code. MISS. CODE ANN. § 53-1-17 (1972).

[60] 227 Miss. 885, 87 So. 2d 286 (1956).

[61] Under Law of April 4, 1946, ch. 381, § 7, [1946] Miss. Gen. Laws 605 (repealed 1966) the Game and Fish Commission enforced water pollution prevention.

It is indeed remarkable that recovery, based on negligence per se, has been available for 17 years and has not made its way to the Mississippi Supreme Court. Liability of the oil and gas well operator based on negligence per se is not novel. Several states already accept it as the basic theory of recovery.

Oklahoma, a leading oil and gas producing state, has passed the necessary legislation and accepted the principle for years. In *Texas Co. v. Belvin*[62] the Oklahoma Supreme Court, announcing finally that violation of an Oklahoma statute[63] constitute negligence per se, said:

> [S]ince the law positively requires that all waste oil and refuse from tanks or wells shall be drained into proper receptacles and be immediately burned or transported from the premises and in no case shall the same or salt water be permitted to flow over the land, it has been repeatedly held that a failure to perform the duty . . . is negligence per se, and no other negligence need be pleaded or proved.[64]

The holding of this case represents the law in Oklahoma today. Kansas, Oregon, and Illinois also follow this rule.[65]

Even Texas, whom Mississippi has closely followed in this area of law, has held that negligence per se is an accepted theory of recovery for surface damages. In the much discussed case of *Gulf Oil Corp. v. Alexander*[66] the Texas Court of Civil Appeals upheld liability based on a violation of Rule 20 of the Railroad Commission of Texas,[67] without proof of negligence. While the law has been roundly criticized,[68] it has never been repudiated by the Texas courts. However, neither has it been greatly expanded.[69]

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[62] 207 Okla. 549, 251 P.2d 804 (1952).

[63] OKLA. STAT. ANN. tit. 52, § 296 (1951). There had been in Oklahoma some controversy as to whether violation of the statute, adopted in 1910, was negligence per se. *See* Commercial Drilling Co. v. McKee, 162 Okla. 204, 19 P.2d 338 (1933); Pure Oil Co. v. Chisolm, 181 Okla. 618, 75 P.2d 464 (1936). Since *Texas Co. v. Belvin*, the rule has been that violation of the statute is negligence per se. *See also* Texas Co. v. Mosshamer, 175 Okla. 202, 51 P.2d 757 (1935); Marland Oil Co. v. Hubbard, 168 Okla. 518, 34 P.2d 278 (1934).

[64] 207 Okla. 549, 550, 251 P.2d 804, 805-06 (1952).

[65] SUMMERS § 652, at 28 n.24.2. Kansas not only recognizes negligence per se as a theory of recovery, but, before the statute on which such is based was passed, that jurisdiction recognized strict liability based on the dangerous instrumentality doctrine of Rylands v. Fletcher, L.R. 1 Ex. 264 (1866), L.R. 3 H.L. 300 (1868). *See* Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934).

[66] 291 S.W.2d 792 (Tex. Civ. App. 1956), *cert. denied,* 295 S.W.2d 901 (Tex. 1956).

The rule in Mississippi may soon change from the negligence standard determined by the prudent-operator rule to negligence per se based on Section 53-1-17 (c) (1) of the Mississippi Code. Not only would this comply with the general rule as stated by Summers,[70] but it would also comply with what apparently was the intention of the legislature in passing the 1956 and 1970 statutes. The legislative intent is very strongly indicated by the following statement in the Act:

> [I]t is the policy of the state not only to conserve minerals but to conserve and protect its surface lands for agriculture, timber and any and all other beneficial purposes, and the destruction of surface lands where reasonable means of their protection exist shall no longer be permitted.[71]

The writer's reasoning that a negligence per se ruling is imminent stems from the fact that the State Oil and Gas Board of Mississippi is revising its regulations pertaining to section 53-1-17 (c) (1). Proposed Rule 63 says that all pits shall be so constructed that they will not cause pollution of fresh water or soil outside the confines of the pit.[72] Rule 63 will provide more stringent requirements to be met by the operators and promises stricter penal enforcement by the Board. However, it does not provide any stronger grounds for the acceptance of tort recovery under the theory of negligence per se than did the 1956 statute. Its role in developing the new principle of recovery will be to create awareness among the Bar and, hopefully, spur a damaged lessor's attorney to file suit based on negligence per se.

It is this writer's contention that such a suit should be successful; however, it is not a "lead pipe cinch." Oklahoma's statute positively states that ". . . in no case shall it [waste oil and refuse from wells] be permitted to flow over the land."[73] Mississippi's law contains what the supreme court may interpret as a caveat, preventing the imposition of strict liability. It says the fresh water and soil ". . . shall be protected from pollution where reasonable means of their protection exist."[74] Certainly, it may be argued by defendants that negligence must be shown for a violation of the statute to exist.

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[67] Rule 20 says, "Fresh water, whether above or below the surface shall be protected from pollution, whether in drilling, plugging or disposing of salt water already produced."

[68] Keeton & Jones, *supra* note 29, at 10-11.

[69] Jones, *supra* note 1, at 346-47.

[70] *See* note 39 *supra.* The Mississippi Supreme Court adopted this as the law in Mississippi in Cities Service Oil Co. v. Corley, 197 So. 2d 244, 246 (Miss. 1967).

[71] MISS. CODE ANN. § 53-1-17 (c) (1) (1972).

[72] MISS. OIL AND GAS BOARD PROPOSED RULE 63 (1973). Generally as to earthen pits, see III B 2 (c) (1). As to burn pits, see III B 2 (e) (1). As to mud pits, see III B 2 (g). The regulation will supercede MISS. OIL AND GAS BOARD ORDER NO. 430-70 (Nov. 18, 1970), which superceded MISS. OIL AND GAS BOARD ORDER NO. 245-56 (Sept. 19, 1956).

It seems doubtful, however, that the Oil and Gas Board of Mississippi or the Mississippi Air and Water Pollution Control Commission[75] would accept such an argument in penal actions under the Act. If not, it is inconceivable that a court would consider negligence as requisite to a showing of a violation of the statute for the purposes of civil recovery under the theory of negligence per se.

Before concluding, it is appropriate to note that Mississippi has never accepted strict liability for surface damages caused by outpourings of slush pits on the basis of *Rylands v. Fletcher.*[76] It was recently written in this publication that strict liability for use of a dangerous instrumentality was an accepted theory of recovery in oil and gas cases involving damages to surface owners.[77] It is questionable that this principle still prevails in this jurisdiction. In 1967, in *Cities Service Oil Co. v. Corley,*[78] the Mississippi Supreme Court specifically denied that absolute liability to the overlying surface owner, based on *Rylands v. Fletcher,* was the law in this state. Justice Inzer, speaking for the court and quoting *Sun Oil Co. v. Nunnery,* wrote "[w]hether [lessee] was negligent is measured by the external standard of the prudent operator. . . ."[79] It is unfortunate that this decision was reached,[80] but the same effect will be brought about by acceptance of the negligence per se standard.

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[73] OKLA. STAT. ANN. tit. 52, § 296 (1951).

[74] MISS. CODE ANN. § 53-1-17 (c) (1) (1972).

[75] The Mississippi Air and Water Pollution Control Commission must approve the Oil and Gas Board's rules and regulations in the pollution area. *Id.*

[76] L.R. 1 Ex. 264 (1866), L.R. 3 H.L. 300 (1868).

[77] Custy, *Tort Liability in Oil and Gas Operations in Mississippi,* 44 MISS. L.J. 638, 639 n.10 (1973). This opinion is based on General Geophysical Co. v. Brown, 205 Miss. 189, 38 So. 2d 703 (1949), and Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954). Both cases involve the use of explosives in oil and gas operations. Even if the rationale still prevailed, it is based on the use of explosives and would be of no aid to a land-owner damaged by a pit overflow.

[78] 197 So. 2d 244 (Miss. 1967).

[79] *Id.* at 246.

[80] For an excellent discussion of strict liability in slush pit cases based on *Rylands v. Fletcher,* see Green, *Hazardous Oil and Gas Operations: Tort Liability,* 33 TEXAS L. REV. 574 (1955).

CONCLUSION

As is obvious from the foregoing, this writer favors strict liability of the oil and gas operator to the surface owner, whether he is the lessor or not, for damages caused by the outpouring of deleterious effluents from a slush pit. It is absurd to offer a potential mineral lessor the alternative of not leasing his minerals, so as to protect his surface, or of leasing the minerals and hoping that he can prove negligent construction or maintenance of the slush pit if his property is devastated by its overflow.

In 1972, Mississippi's 3,702 wells[81] produced 4,846,109 barrels of crude oil and condensate, and 16,992,110 barrels of salt water.[82] Undoubtedly, this production has been very beneficial to this State and its citizens. Further, there is no question that mineral lessors have profited handsomely from it. However, the amount of irreparable damage that can be done by such an enormous operation staggers the imagination.

The Mississippi Legislature has adopted a policy to protect the waters and the surface lands of the State from this potential destruction. Such a policy is sound and prudent. It is equally proper to require that individual surface owners and users be repaid for injury to their property stemming from this necessary, but dangerous activity.

That the courts of Mississippi have not followed this policy is unfortunate, especially in light of the fact that many operators consider payment of surface damages as part of the cost of doing business and often pay the surface owners without even going to court.[83] Hopefully, the Mississippi Supreme Court will soon adopt the logic of these operators, the Mississippi Legislature, and other jurisdictions and impose strict liability on all operators for damage to the surface, regardless of negligence.

Haley Barbour

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[81] BULLETIN, MISS. OIL AND GAS BOARD 54 (May 1973).

[82] *Id.* at 7.

[83] Interview with W. D. Mounger, Vice President, Independent Petroleum Ass'n of America, July 23, 1973.

CONSTITUTIONAL CHALLENGE TO THE JUSTICE OF THE PEACE COURT IN MISSISSIPPI

I. Introduction

The importance of the justice of the peace and his role in judicial administration is often overlooked and underestimated. The justices of the peace ". . . are the first and for many the sole source of public contact with the administration of justice, and they are in a position profoundly to affect, for good or ill, popular conceptions of the judicial structure and of justice itself."[1]

Three class actions have been filed[2] in federal district court challenging the criminal and civil jurisdiction of the justice of the peace courts in Mississippi.[3] In these suits plaintiffs allege that Mississippi statutes vesting the justice of the peace courts with criminal and civil jurisdiction are unconstitutional and deprive the defendants in such courts of their constitutional rights guaranteed by the fifth and 14th amendments of the United States Constitution. This is not the first time that constitutional questions have been raised against these courts, but in the past the Mississippi justice of the peace courts have withstood the challenge.[4] In other States, the justice of the peace courts have been under attack by legal scholars for years; and many States have abolished or modified the system.[5]

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[1] Note, *The Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary,* 52 Va. L. Rev. 151, 153 (1966).

[2] Boone v. Dennis, No. 72J-118 (N) (S.D. Miss., filed June 8, 1972) (challenging the civil jurisdiction of the justice of the peace court). Davis v. Robbins, No. 72J-113 (N) (S.D. Miss., filed June 1, 1972) (challenging the criminal jurisdiction of mayor's courts); Brown v. Vance, No. 72J-91 (N) (S.D. Miss., filed May 12, 1972) (challenging the criminal jurisdiction of justice of the peace courts). The cases were consolidated for hearing, and a motion to dismiss was denied on April 10, 1973. These cases are now pending.

[3] Miss. Const. art. 6, § 171 (1890); Miss. Code Ann. § 99-33-1 (1972), *formerly* Miss. Code Ann. § 1831 (1942) (criminal jurisdiction); Miss. Code Ann. § 9-11-9 (1972), *formerly* Miss. Code Ann. § 1805 (Supp. 1972) (civil jurisdiction).

[4] Hitt v. State, 149 Miss. 718, 115 So. 879 (1928); Foote v. State, 115 So. 886 (Miss. 1928); Jones v. State, 115 So. 886 (Miss. 1928); Arnold v. State, 149 Miss. 739, 115 So. 885 (1928); Bryant v. State, 146 Miss. 533, 112 So. 675 (1927), *followed in* Melikian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969).

[5] Dolan & Fenton, *The Justice of the Peace in Nebraska,* 48 Neb. L. Rev. 457, 473-86 (1969) (a comparison of the approaches several States have taken to solve the problems of justice of the peace courts, including Kansas, Colorado and Illinois); *see* Vanlandingham, *The Decline of the Justice of the Peace,* 12 Kan. L. Rev. 389 (1964) (summary of justice of the peace court reform in particular States). *See also* Clark, *Parajudges and the Administration of Justice,* 24 Vand. L. Rev. 1167 (1971).

Mississippi has recognized the need for reform in the justice of the peace courts. In 1970, the Mississippi Judiciary Commission said:

> The court about which there is the most dissatisfaction within the state is the justice of the peace court. . . . There is considerable sentiment and many logical reasons for abolition of the justice of the peace courts and their replacement with a small claims and misdemeanor court presided over by a lawyer-judge. However, the commission does not recommend eliminating these courts, for many practical reasons, but recommends a considerable upgrading of them. This is an urgent need in Mississippi.[6]

The State has made some efforts to upgrade the system,[7] but these efforts appear to be far from sufficient to meet the need for competent judicial administration in a modern court system. Little has been accomplished to remedy the inherent defects in the system, and consequently these courts appear vulnerable to a constitutional challenge. If the system fails to meet minimum standards for the administration of justice, it would seem to fail to meet the minimum standards for due process of law.

In the three suits attacking the justice of the peace court system, constitutional questions are raised as a result of three inherent defects in the justice of the peace system: (1) the lack of judicial qualifications of the justices, (2) the fee system of compensation, and (3) the commingling of prosecutorial and judicial roles. In Mississippi, justices of the peace are not required to have any formal legal training.[8] It is contended that a minimum standard of judicial competence is required of a judge in order to achieve "due process" in a trial court, and that the Mississippi justice of the peace court system has failed to meet this standard.[9] Under the fee system justices are compensated according to the volume of cases heard in their court.[10] Therefore, there may be a natural inclination to favor those parties who are in a position to bring them cases. Because of this, justices are allegedly predisposed to favor the interests of law enforcement officials.[11] In such a situation a defendant's rights to an impartial hearing are prejudiced, depriving him of his right to due process. Similarly, in civil cases, it is argued that justices are predisposed to favor creditors who bring them accounts for collection,[12] again depriving a defendant of his constitutional right to an impartial hearing. Finally, it is contended that whenever a justice of the peace serves as both judge and prosecutor, a defendant is denied due process of law.[13]

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[6] MISSISSIPPI JUDICIARY COMMISSION, REPORT TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI 57 (Jan. 6, 1970).

[7] *E.g.*, MISS. CODE ANN. § 7-5-59 (1972) (as amended), *formerly* MISS. CODE ANN. § 1803.2 (Supp. 1972) (requiring justices of the peace to have completed an 18-hour training course offered by the attorney general of the State of Mississippi). In 1973 a manual for the justices of the peace was prepared by the Mississippi Law Center. The manual was designed to provide simple instructions on judicial procedure. MISSISSIPPI LAW CENTER, UNIVERSITY OF MISSISSIPPI, 1973 HANDBOOK FOR THE JUSTICES OF THE PEACE (1973).

[8] *See* note 16 & text accompanying note 16 *infra*.

[9] Plaintiff's Memorandum in Opposition to Motion to Dismiss at 2, Brown v. Vance, Civil No. 72J-91 (N) (S.D. Miss., filed May 12, 1972).

[10] *See* text accompanying notes 24-26 *infra*.

In view of this recent challenge to the justice of the peace system in Mississippi, it is appropriate to examine the inherent defects of the system and to consider the relative merits of the constitutional objections. It is not the purpose of this comment to malign the individual justice of the peace nor to condemn his efforts, but rather it is to focus attention upon an institution which is hard pressed to meet the demands of a modern legal system.

II. The Justice of the Peace System in Mississippi

The justice of the peace court in Mississippi was established by the Mississippi Constitution of 1890.[14] Each county is divided into five districts and a justice of the peace is elected from each.[15] No legal training is required of a person elected to the office.[16] However, prior to taking office, all justices must complete an 18-hour orientation course offered by the state attorney general.[17] The justice of the peace courts have jurisdiction to try misdemeanors committed within their district. This criminal jurisdiction is granted by the constitution and by statute: "Justices of the peace shall have jurisdiction concurrent with the circuit court of the county over all crimes occurring in their several districts whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail. . . ."[18]

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[11] Plaintiff's Memorandum in Opposition to Motion to Dismiss at 1, Brown v. Vance, Civil No. 72J-91 (N) (S.D. Miss., filed May 12, 1972).

[12] *Id.* at 3.

[13] *Id.* at 2.

[14] Miss. Const. art. 6, § 171 (1890).

[15] Miss. Code Ann. § 9-11-1 (1972) (as amended), *formerly* Miss. Code Ann. § 1803 (Supp. 1972).

[16] A justice of the peace only needs to be a qualified elector and a 2-year resident of the district in which he runs. Mississippi Judiciary Commission, *supra* note 6, at 67. The Mississippi Constitution prohibits placing additional qualifications on a constitutional office. *Compare* Miss. Const. art. 12, § 250, *with* Miss. Const. art. 6, § 171.

[17] Miss. Code Ann. § 7-5-59 (1972) (as amended), *formerly* Miss. Code Ann. § 3828-11 (Supp. 1972).

The justice of the peace court also serves as a small claims court with civil jurisdiction granted and limited by the constitution and by statute: "Justices of the peace shall have jurisdiction of all actions for the recovery of debts or damages, or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed two hundred dollars ($200.00)."[19] Normally a civil suit should be brought in the district where the defendant resides. But, venue is also proper ". . . in the district in which the debt was contracted, the liability incurred, or in which the property may be found."[20]

The justices of the peace have additional powers extending over the entire county, including the powers to issue search warrants and arrest warrants,[21] to conduct preliminary hearings,[22] and to set bail.[23] These powers apply to both felonies and misdemeanors.

The justices are paid $5 by the county for each criminal case that they try regardless of the disposition of the case.[24] If the justice prepares an appeal and takes a bond, he receives an additional fee of $3 from the appellant.[25] In civil cases the justice receives a fixed statutory fee of $6 for each case whether contested or uncontested.[26]

On appeal from a conviction in a justice of the peace court, a defendant is allowed a trial de novo in circuit court.[27] A defendant must appeal within 10 days and he must post a bond in excess of $100.[28] In the majority of cases, persons appearing before the justice are unrepresented by counsel.[29] Also, appeals are rarely perfected since the amount involved does not warrant the expenditure.[30]

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[18] MISS. CODE ANN. § 99-33-1 (1972), *formerly* MISS. CODE ANN. § 1831 (1942); MISS. CONST. art. 6, § 171 (1890). *See also* Childres v. State, 136 Miss. 829, 101 So. 857 (1924).

[19] MISS. CODE ANN. § 9-11-9 (1972) (as amended), *formerly* MISS. CODE ANN. § 1805 (Supp. 1972); MISS. CONST. art. 6, § 171 (1890).

[20] MISS. CODE ANN. § 11-9-101 (1972), *formerly* MISS. CODE ANN. § 1806 (Supp. 1972).

[21] MISS. CODE ANN. §§ 9-9-23, 99-3-21, 99-27-15 (1972), *formerly* MISS. CODE ANN. §§ 1609, 2476, 2614 (1942).

[22] MISS. CODE ANN. § 99-3-17 (1972), *formerly* MISS. CODE ANN. § 2473 (1942).

[23] MISS. CODE ANN. § 99-15-1 *et seq.* (1972), *formerly* MISS. CODE ANN. § 2568 (1942).

[24] MISS. CODE ANN. § 25-7-25 (1972) (as amended), *formerly* MISS. CODE ANN. § 3940 (Supp. 1972).

[25] *Id.*

[26] *Id.*

[27] MISS. CODE ANN. § 11-51-85 (1972) (as amended), *formerly* MISS. CODE ANN. § 1201 (Supp. 1972).

[28] *Id. See generally* W. Keady, *Appeals to Circuit Court,* in CIRCUIT COURT PRACTICE 224-32 (Mississippi Law Institute ed. 1966).

The justice of the peace court is both convenient and economical in administration. Because the courts are numerous, they are easily accessible and the cost of litigation is kept to a minimum. Generally, the office is held by a person untrained in the law, and often lacking any education beyond the high school level.[31]

III. CHALLENGES TO THE JUSTICE OF THE PEACE SYSTEM

Traditionally, defendants charged with misdemeanors were tried in justice of the peace courts in which a justice collected his fee only upon a defendant's conviction.[32] Unquestionably, the justice had a pecuniary interest in the outcome. Few challenges to this fee system of compensation had been attempted in the courts until the landmark case of *Tumey v. Ohio* in 1927.[33] In a mayor's court, Tumey was convicted of the unlawful possession of liquor, a misdemeanor. Tumey appealed, contending that the mayor had a financial interest in the conviction. The mayor received a fee of $12 upon Tumey's conviction. Had there been an acquittal, the mayor would have received nothing. The United States Supreme Court declared the system unconstitutional, stating the general proposition "[t]hat officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. . . ."[34] The Court further noted that Tumey had "seasonably objected" to the proceedings, and that the amount of the fee could not be considered within the maxim *"de minimus non curat lex."*[35] The *Tumey* opinion clearly indicates that a judge who has a pecuniary interest in the outcome is disqualified to render judgment in a case. The pecuniary interest factor alone constituted a fatal denial of due process of law:

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[29] H. JAMES, CRISES IN THE COURTS 44 (rev. ed. 1971). *See also* Vanlandingham, *Pecuniary Interest of Justices of the Peace in Kentucky; The Aftermath of Tumey v. Ohio,* 45 KY. L.J. 607, 621 (1957).

[30] Smith, *The Justice of the Peace System in the United States,* 15 CALIF. L. REV. 118, 125 (1927). *See also* 46 MINN. L. REV. 403, 412 (1961).

[31] *Hearings on Justice of the Peace Courts and Judges before the Mississippi Judiciary Commission,* (Aug. 16, 1969) (R. Hugo Newcomb, Sr., Asst. State Attorney General testified: "If we retain the justice of the peace court system it should and must be upgraded. . . ." *Id.* at 1. "33% of the justices of the peace are limited in educational background to the extent that they are not capable of learning the necessary elements of law and principles of judicial administration." *Id.* at 2.).

[32] *See* Lee, *The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace,* 20 FED. B.J. 111 (1960). *See also* Note, 5 WIS. L. REV. 177 (1927); Comment, 36 YALE L.J. 1171 (1927); Annot., 50 A.L.R. 1244 (1928).

[33] 273 U.S. 510 (1927). This case has been extensively commented upon with approval. *See* Keebler, *Our Justice of the Peace Courts—A Problem in Justice,* 9 TENN. L. REV. 1 (1930); 40 HARV. L. REV. 1149 (1927); 5 N.C. L. REV. 357 (1927); 13 VA. L. REV. 584 (1927); 5 WIS. L. REV. 177 (1929); 36 YALE L.J. 1171 (1927). *See also* 50 A.L.R. 1243.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden or proof required to convict a defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.[36]

One year after *Tumey,* in the case of *Dugan v. Ohio,*[37] the United States Supreme Court, on similar facts, reaffirmed its position in *Tumey,* but limited its application. Dugan was convicted of violating the prohibition laws of the State of Ohio. Dugan claimed that the mayor, an ex-officio justice of the peace, occupied ". . . two practically and seriously inconsistent positions, one partisan and the other judicial. . . ."[38] Dugan further charged that the mayor had an interest in the outcome as he was compensated out of the "general fund" into which fines were paid upon conviction. In rejecting Dugan's argument, the Court said that the pecuniary interest of the judge was too indirect and "remote" to constitute a denial of due process.[39]

Following the *Tumey* case, the justice of the peace courts in many States came under attack. Most state courts, in an attempt to distinguish *Tumey* and to limit its application, simply pointed to one or more of the "procedural safeguards" available in that State which were unavailable to Tumey. Thus, where a defendant had a right to a jury trial or a trial de novo on appeal to a higher court, procedural due process requirements were said to be satisfied.[40] Some state courts took the position that a defendant had a right to object to being tried before a judge with an alleged pecuniary interest in the outcome of the case but, if he did not "seasonably object," defendant was deemed to have waived his right, and he could not raise the objection for the first time on appeal.[41] Also, if a defendant "seasonably objected," and refused a change of venue to a court presided over by a salaried justice, then procedural due process requirements were deemed satisfied.[42] States were able to defend the fee system of compensation by arguing that the pecuniary interest of the fee-paid justice was negligible and within the maxim "*de minimus non curat lex*."[43] Some state courts said that *Tumey* was intended to condemn a system in which a judge would be paid only upon a conviction, and that if a judge was also paid a fee upon acquittal of a defendant, then there was no pecuniary interest.[44]

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[34] 273 U.S. at 522.

[35] *Id.* at 531.

[36] *Id.* at 532.

[37] 277 U.S. 61 (1928).

[38] *Id.* at 62.

[39] *Id.* at 65.

[40] Cases cited note 2 *supra. See also* Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927) (de novo on appeal); State v. Schelton, 205 Ind. 416, 186 N.E. 772 (1933); State v. Gonzales, 43 N.M. 498, 95 P.2d 673 (1939); Brooks v. Town of Potomac, 149 Va. 427, 141 S.E. 249 (1928). *See generally* Lee, *supra* note 32 (a categorical analysis of the cases).

Mississippi was among those States adopting a narrow interpretation of *Tumey* and restrictiing its application. *Bryant v. State*[45] came before the Mississippi Supreme Court in the year of the *Tumey* decision. Bryant was convicted of a misdemeanor by a justice of the peace and he appealed. Bryant claimed that he was denied due process because the justice was interested in the outcome of the prosecution, as his compensation depended upon conviction. Bryant did not raise this objection in the justice of the peace court; he raised it for the first time on appeal. The Mississippi Supreme Court held that the failure to object to qualifications of the justice before trial, or before losing control of the judgment, was a waiver of the defendant's right to object to a denial of due process.[46]

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[41] Adams v. Slavin, 225 Ky. 135, 7 S.W.2d 836 (1928), *overruled by* Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956); Bryant v. State, 146 Miss. 533, 112 So. 675 (1927), *followed in* Brown v. State, 149 Miss. 219, 115 So. 436 (1928).

[42] Application of Borchert, 359 P.2d 789 (Wash. 1961), *criticized in* 47 IOWA L. REV. 1094 (1962) ("a three-decade regression in the concept of due process" *Id.* at 1103); 46 MINN. L. REV. 403 (1961); 36 WASH. L. REV. 519 (1961) ("The Washington court's preoccupation with distinguishing away *Tumey* seems to have caused it to ignore the fundamental policy expressed by the Supreme Court regarding the interested judge." *Id.* at 526.).

[43] *See, e.g.,* Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932); State v. Shelton, 205 Ind. 416, 186 N.E. 772 (1933). This rationale was criticized in Rollo v. Wiggins, 149 Fla. 264, 276, 5 So. 2d 458 (1942).

[44] Not all attempts to defend the justice of the peace courts and the fee system of compensation have been successful. *See, e.g.,* Callahan v. Sanders, 339 F. Supp. 814 (M.D. Ala. 1971) (granting injunctive relief against pending or future prosecutions for traffic violations); Bennett v. Cottingham, 290 F. Supp. 759 (N.D. Ala. 1968), *aff'd,* 393 U.S. 317 (1969) (statutory fee system gave justices a pecuniary interest in the outcome of a case); Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966) (pecuniary interest in the outcome; de novo trial on appeal does not cure the defect: "We do not think that the plaintiff can be required to submit to an unconstitutional trial as a prerequisite to being accorded a valid trial de novo." *Id.* at 209-10); Doty v. Goodwin, 437 S.W.2d 233 (Ark. 1969) (disqualification for pecuniary interest), *noted in* 23 ARK. L. REV. 277 (1969); Roberts v. Noël, 296 S.W.2d 745 (Ky. 1956) (declared the fee system unconstitutional), *noted in* 45 KY. L.J. 607 (1957); State v. Chinn, 121 S.E.2d 610 (W. Va. 1961) (held a violation of due process when justices of the peace were paid a salary out of a fund consisting of fines collected).

[45] 146 Miss. 533, 112 So. 675 (1927).

The waiver argument is of questionable validity. The United States Supreme Court has said that it does not presume a waiver of constitutional rights. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege,"[47] and ". . . courts indulge every reasonable presumption against waiver of fundamental constitutional rights."[48]

A more significant Mississippi decision is that of *Hitt v. State*.[49] In *Hitt* the defendant was convicted in a justice of the peace court and appealed his conviction to the circuit court. Defendant, relying on the *Tumey* decision, contended that the justice was without jurisdiction to try the case because he had a pecuniary interest in conviction. Defendant further argued that since the justice was without jurisdiction, the circuit court was without jurisdiction to entertain an appeal and should dismiss the case. However, the Mississippi Supreme Court specifically distinguished *Tumey*, noting that Mississippi justices of the peace were compensated for their services upon acquittal or conviction, and therefore did not have the specific pecuniary interest in the outcome as was condemned in *Tumey*.[50] The court further stated that ". . . whatever error was committed by the justice of the peace in his view of the law, or his determination of the facts, was cured by the full, free, fair, and impartial de novo trial accorded him in the circuit court."[51]

Thus, since a judgment rendered in a justice of the peace court is voidable if timely objection is made,[52] or the defendant can obtain a trial de novo in circuit court on appeal, the Mississippi Supreme Court has held that the requirements of "due process" are satisfied.[53]

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[46] *Id.* at 539, 540, 112 So. at 676.

[47] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963), *followed in* Conn v. State, 251 Miss. 488, 170 So. 2d 20 (1964) (". . . there must be an intelligent and competent waiver of counsel by the defendant . . . ." *Id.* at 495, 170 So. 2d at 23); Argersinger v. Hamlin, 407 U.S. 25 (1972); Miranda v. Arizona, 384 U.S. 436 (1965).

[48] 304 U.S. at 464.

[49] 149 Miss. 718, 115 So. 879 (1928).

[50] *Id.* at 729, 115 So. at 882.

[51] *Id.* at 735, 115 So. at 884.

[52] It has been argued that when the fee system of compensation gives a judicial officer a pecuniary interest in the outcome, and denies a defendant due process, any judgment is void, not voidable, as the court is corum non judice. Thus, if a court lacks jurisdiction a judgment is void. *See, e.g., Ex parte* Baer, 20 F.2d 912 (E.D. Ky. 1927); Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956). *See also* 52 VA. L. REV. 151, 161 n.81 (1966).

In 1969, the Mississippi justice of the peace system was attacked in federal court in *Melikian v. Avent.*[54] Plaintiffs argued the unconstitutionality of the fee system of compensation and contended that the right to take an appeal de novo in circuit court did not cure the constitutional defect. Plaintiffs also contended that the defendants in justice of the peace courts were deprived of constitutional due process because the justices lacked sufficient training in the law to insure that proper judicial procedures were followed. The federal district court found this latter argument "unique and of no merit" and summarily dismissed it as "novel," finding ". . . no justification for such a determination."[55]

Considering the constitutionality of the fee system, the district court in *Melikian* followed the same line of reasoning that had been taken by the Mississippi Supreme Court in distinguishing *Tumey*. As justices of the peace in Mississippi were paid fees by the county regardless of the outcome of a case, the court found that the defendant's rights were not unconstitutionally prejudiced. The court was also unimpressed with the argument that a justice of the peace would be inclined to favor creditors who bring him "business."[56] Rejecting this argument, the court stated that "[a]ny prejudice to which [plaintiff] might have been subjected . . . is cured and due process is obtained by the right to a jury trial."[57]

It is suggested that these arguments deserved more than the cursory treatment they received. The allegations were not pure conjecture. Analysis tends to expose the inherent weaknesses of the justice of the peace system and to support the validity of the criticism.[58]

IV. AN ANALYSIS OF THE THREE DEFECTS

A. Judicial Competence and Due Process

One of the strongest criticisms of the justice of the peace has been his lack of judicial qualifications and knowledge of judicial procedure.

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[53] Hitt v. State, 149 Miss. 718, 115 So. 879 (1928).

[54] 300 F. Supp. 516 (N.D. Miss. 1969).

[55] *Id.* at 519.

[56] *Id.* at 518.

[57] *Id.* at 518-19.

[58] The court implied that the facts were not sufficiently developed to support the plaintiff's arguments. *See generally* Note, *The Justice of the Peace: Constitutional Questions,* 69 W. VA. L. REV. 314 (1967).

The Mississippi Judiciary Commission reported that "[e]veryone, including the Justice Court Officer's Association, agrees that qualifications for the office should be upgraded."[59] A challenge to the competence of the justice of the peace in judicial administration raises two constitutional questions: (1) Is a defendant guaranteed "due process" in a court where the judge is ignorant of judicial procedure? (2) Are the requirements of due process satisfied by a trial de novo in circuit court on appeal?

In colonial America where business and social relations were relatively simple, the part-time lay justice could efficiently administer justice.[60] Today, in a modern complex society with sophisticated legal processes there is little justification for administration of the law by those lacking any formal legal education. The justice of the peace is required to rule on motions and on the admissibility of evidence. He is required to conduct preliminary hearings and to set bail. He is also expected to make an "objective" determination of "probable cause" when he issues search warrants and arrest warrants; he is not supposed to serve as a "rubber stamp" for police.[61] And when he conducts a jury trial,[62] he is expected to instruct the jury in the law.

Although there appears to be no judicial precedent requiring a justice to be a lawyer, many legal scholars have urged for years that justices of the peace need legal training. In 1930, one writer said:

> The court of original jurisdiction should be administered by a judge capable of administering the law, familiar with the rules of evidence, capable of instructing a jury, where a jury is demanded, and capable of making up a record to be passed on to a reviewing tribunal in the event of an appeal. To allow a court nowadays to sit and hear causes without legal training and without a record of the proceedings except the merest docket entries, is to tolerate a court which in the economy of judicial administration is worse than useless.[63]

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[59] *Mississippi Judiciary Commission, Report, supra* note 6, at 61. *See also* Dolan & Fenton, *The Justice of the Peace in Nebraska,* 48 NEB. L. REV. 457, 461 (1969). *Why Illinois Proposes to Abolish Justice of the Peace Courts,* 46 ILL. B.J. 754, 758 (1958); Note, *The Justice of the Peace Court in Florida,* 18 U. FLA. L. REV. 109, 118 (1965).

[60] Smith, *The Justice of the Peace System in the United States, supra* note 30, at 125; Vanlandingham, *supra* note 5, at 391.

[61] Aguilar v. Texas, 378 U.S. 108, 110 (1964); Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[62] MISS. CODE ANN. § 11-9-143 (1972), *formerly* MISS. CODE ANN. § 1836 (1942).

[63] Keebler, *Our Justice of the Peace Courts—A Problem in Justice,* 9 TENN. L. REV. 1, 5 (1930). *See also* H. JAMES, *supra* note 29, at 57; 46 MINN. L. REV. 403 (1961).

Due process would seem to require more than "common sense" determinations of legal questions. It has been suggested that "due process" at lease requires a judgment "pursuant to the law."[64] While a "common sense" judgment may be pursuant to the law, it is not necessarily so, and is therefore arbitrary and violates due process.[65] A minimum standard of judicial competence and knowledge of the law would appear to be mandatory:

> The objection raised . . . is that it is a fundamental principle of due process of law that a justice, having the power to deprive a person of his liberty or property, must have a working knowledge of the law since the guarantee of due process of law requires that every man must have his day in court and the benefit of the general law; and it is questionable whether a judgment based on 'common sense' would comply with this demand.[66]

There is a serious question whether the part-time lay justice can appreciate or comprehend the complex procedural requirements of due process. Due process is no less important in these minor courts, although the matters before them may seem relatively unimportant. The fact that many defendants who appear in a justice of the peace court are unrepresented by counsel is all the more reason for having a competent judicial officer presiding.[67] These defendants without counsel are generally unaware of their legal rights.[68] As a practical matter, there is usually no appeal and the disposition of the case by the justice of the peace is final.[69]

The Mississippi Supreme Court has said that any denial of "due process" in a justice of the peace court is "cured" by a trial de novo in circuit court.[70] As one writer commented:

> The argument often heard in defense of this ["de novo" position] . . . is that the appellate procedure will detect and correct any fundamental denial of basic rights. This argument has no validity. The vast majority of litigants and accused have neither the knowledge nor the funds to prosecute an appeal. Justice

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[64] Dolan & Fenton, *supra* note 59, at 461; Note, *The Justice of the Peace: Constitutional Questions, supra* note 58, at 324.

[65] Note, *The Justice of the Peace: Constitutional Questions, supra* note 58, at 325.

[66] *Id.*

[67] Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). These cases hold the right to counsel is "fundamental." It would seem a logical corollary that trained judges are "necessities" in criminal courts.

[68] *Ex parte* Baer, 20 F.2d 912, 914 (E.D. Ky. 1927).

[69] Smith, *The Justice of the Peace System in the United States, supra* note 30, at 125. *See also* 46 MINN. L. REV. 403, 412 (1961).

[70] Hitt v. State, 149 Miss. 718, 115 So. 879 (1928) and cases cited note 4 *supra.*

> either stands or falls to these persons upon the pronouncements of an uneducated and often uninformed 'judge.'[71]

An undue burden is placed upon a defendant when he must bear the expense and inconvenience of an appeal in order to receive a fair trial before a qualified and impartial judge. An illustration is the situation of the non-resident motorist who generally would rather pay the fine than appeal his conviction. Undoubtedly, a trial de novo on appeal will correct errors committed in a justice of the peace court. However, the protection afforded by such an appeal can be illusory because it is not realistically available to everyone. Even if the defendant can afford to perfect an appeal the real question is whether "due process" requires a "fair trial in the first instance."[72] The West Virginia Supreme Court said: "The constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or resorting to the delay, annoyance and expense of an appeal."[73]

Respect for the law can hardly be engendered when some of those who administer the laws are seen as incompetent.[74] Because of their lack of legal training, many justices of the peace abuse the judicial process.[75] Such abuses are not the fault of the lay justice, but of a system which places him in a position of judicial authority without requiring the necessary legal training and background to administer the law. Disrespect for the lay justice comes not only from defendants in justice of the peace courts, but from members of the legal profession. It has been suggested that the part-time lay justice of the peace is now an "obsolete" judicial officer, primarily because societal conditions have greatly changed.[76] No doubt the development of complex procedural and substantive laws have contributed to his obsolescence. An assumption that the office is not so important as to require judicial knowledge ignores basic realities of judicial administration.

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[71] Note, *The Justice of the Peace Court in Florida, supra* note 59, at 118-19.

[72] *Ex parte* Baer, 20 F.2d 912, 914 (E.D. Ky. 1927). Most defendants assume they are before a lawfully constituted court. *Id.* at 914. Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956); Williams v. Brannen, 116 W. Va. 1, 5, 178 S.E. 67, 69 (1935).

[73] Williams v. Brannen, 116 W. Va. 1, 5, 178 S.E. 67, 69 (1935).

[74] *Hearings, supra* note 24.

[75] State *ex rel.* Richardson v. Edgeworth, 214 So. 2d 579 (Miss. 1968) (threat of criminal process to collect civil debts).

[76] Butts, *Justice of the Peace—Recent Tendencies,* 1 MISS. L.J. 195 (1928); Nordberg, *Farewell to Illinois J. P.'s,* 40 CHI-KENT L. REV. 23 (1963); Vanlandingham, *supra* note 5; Note, *The Justice of the Peace in Florida, supra* note 59; Note *The Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary,* 52 VA. L. REV. 151 (1966).

Procedural due process would appear to require a minimum standard of judicial competence of those who would act with judicial authority. Where this standard is not met, the right to "seasonably object" or to obtain a de novo trial on appeal is not a satisfactory "cure." In the absence of such a standard, the Mississippi system appears to be open to a constitutional challenge.

B. The Fee System and Due Process

The most objectionable feature of the justice of the peace court is the fee system of compensation. Here the system is most vulnerable to a constitutional challenge. One writer called the fee system "one of the striking anachronisms of the American system of justice still prevailing in the late twentieth century. . . ."[77] The Mississippi justices of the peace are compensated according to a statutory fee schedule.[78] The justices receive a fee for each case they hear, and their income depends upon the number of cases brought before them. As was noted by the Mississippi Judiciary Commission, this method of compensation has no place in our judicial system: "The fee system for compensating both justices of the peace and constables is unsound and potentially lends itself to many abuses—even among men who are conscientious and honest."[79] Their recommendation was to abandon the fee system and place justices of the peace on a salary.[80] This recommendation is sound, for the fee system may encourage economic competition among justices for "business," as ". . . the fee-paid justice is prone to regard his office as a business rather than as a vehicle for the administration of justice."[81] Because "it is to the advantage of the justice of the peace . . . to do a volume business",[82] justices may well be persuaded to favor the interests of law enforcement officers who bring them cases.[83] The justice of the peace who is popular with law enforcement officers because he maintains a high conviction rate will be likely to receive the most cases. The justice who is not amenable to the wishes of law enforcement officers with respect to convictions and issuing warrants may find himself losing his "business" and his livelihood. Under such circumstances, as the Mississippi Judiciary Commission noted, ". . . it is very difficult to be entirely objective."[84] Although a high conviction rate in itself is not necessarily an indication of abuse of judicial authority and favoritism, a system which encourages economic competition is in contradiction to the ideal of impartiality required of the judicial process.

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[77] Note, *Wood v. Good Shield: Derogation of Due Process to Maintain an Archaic System,* 17 S.D. L. REV. 264 (1972).

[78] MISS. CODE ANN. § 25-7-25 (1972) (as amended), *formerly* MISS. CODE ANN. § 3940 (Supp. 1972).

[79] MISSISSIPPI JUDICIARY COMMISSION, REPORT, *supra* note 6, at 57.

[80] *Id.* at 7.

[81] Vanlandingham, *supra* note 5, at 391.

[82] MISSISSIPPI JUDICIARY COMMISSION, REPORT, *supra* note 6, at 59.

[83] *Id.* at 58. *See also* Application of Borchert, 359 P.2d 789, 799 (Wash. 1961) (dissenting opinion); Note, *The Justice of the Peace: Constitutional Questions, supra* note 58, at 317-18.

In civil actions justices may be persuaded to favor creditors in collecting civil debts so that these "customers" will again bring the justice of the peace their collection business:

> Civil creditors, especially large businesses, are able to exert entirely too much economic pressure over a justice of the peace who must rely on court costs for his livelihood. . . . The justice of the peace is naturally under great pressure . . . .[85]

To suggest that a justice of the peace would not be inclined to favor creditors would seem to ignore economic realities. As one judge stated: "The income of the fee justice of the peace depends directly upon the volume of cases filed. If no cases are filed, he receives nothing. Vice inheres in the system. That under this system there is a very real likelihood of bias. . . ."[86] The inherent "bias" is not the fault of the justice of the peace, but of a system that encourages economic competition.

The question is open as to whether the fee system should be void in its entirety for want of due process under the principle announced in *Tumey*.[87] *Dugan*[88] should not be considered a definitive limitation of *Tumey*, especially in the light of subsequent decisions of the United States Supreme Court, and its careful scrutiny where procedural due process is at issue.[89] *Tumey* would appear to strike down any fee system where a judge has a pecuniary interest in the outcome of the litigation. A judge who, because of this system, may be inclined to favor law enforcement officers or creditors is not a disinterested judge. If the fee system has a built-in pronounced tendency toward bias, there would seem to be an abrogation of a defendant's constitutional rights to a fair and impartial tribunal. Note the language of the United States Supreme Court in *In re Murchison:*[90]

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[84] MISSISSIPPI JUDICIARY COMMISSION, REPORT, *supra* note 6, at 58; *accord*, Banyon, *Justice Courts on Trial*, 37 MICH. ST. B.J. 35 (1958); Note, *The Justice of the Peace: Constitutional Questions*, *supra* note 58.

[85] MISSISSIPPI JUDICIARY COMMISSION, REPORT, *supra* note 6, at 58.

[86] Application of Borchert, 359 P.2d 789, 794-804 (Wash. 1961) (dissenting opinion).

[87] 273 U.S. 510; Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956). *See* cases cited note 44 *supra*.

[88] Dugan v. Ohio, 277 U.S. 61 (1928).

[89] Argersinger v. Hamlin, 407 U.S. 25 (1972); Miranda v. Arizona, 384 U.S. 436 (1966); Estes v. Texas, 381 U.S. 532, 543 (1965) (televising trial proceedings infringed upon defendant's fundamental right to a fair trial); Gideon v. Wainwright, 372 U.S. 335 (1963).

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'[91]

Although it may be inferred from the *Tumey* and *Murchison* decisions that an infinitesimal pecuniary interest would prejudice the rights of a criminal defendant, the United States Supreme Court has yet to clarify its holdings in these decisions. Without a doubt, a fee system of compensation, even though not dependent upon the outcome, raises some serious constitutional questions.

C. *The Justice of the Peace as Judge and Prosecutor*

In misdemeanor cases where the justice of the peace serves as both a judge and a prosecutor, the requisite "objectivity" of an impartial judge would appear to be compromised. Such a system is vulnerable to a constitutional challenge. It is not necessary to repeat the criticism of the fee system and its tendency to upset the balance of judicial indifference, but the criticisms are equally applicable to a situation in which the justice of the peace is both judge and prosecutor. The system offers a ". . . possible temptation to the average man as a judge to forget the burden of proof required to convict [a] defendant."[92] There is the danger that a justice of the peace will not ". . . hold the balance nice, clear and true, between the State and the accused."[93] If judicial and prosecutorial roles are frequently commingled and a justice of the peace is called upon to issue a search warrant, then it is difficult for the justice to perform the "neutral and detached function" required of him in determining whether probable cause exists.[94] Moreover, public confidence in the propriety of the court is undermined when the justice of the peace is both judge and prosecutor.[95] An objectionable situation is apparent in a mayor's court with the mayor acting as an ex officio justice of the peace. The mayor is the chief executive officer of the municipality and exercises supervisory control over law enforcement officials. His relationship to law enforcement officials would not seem to "satisfy the appearance of justice."[96]

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[90] 349 U.S. 133 (1955), *quoting from* Offutt v. United States, 348 U.S. 11, 14 (1954).

[91] 349 U.S. at 136 (emphasis added).

[92] Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[93] *Id. See also* Note, *The Justice of the Peace Court in Florida,* supra note 59, at 124.

[94] Aguilar v. Texas, 378 U.S. 108 (1964).

V. CONCLUSION: ON JUDICIAL REFORM

There is merit in having a court that is "close to the people." A justice of the peace is often aware of a defendant's personal circumstances and therefore able to temper justice with compassion.[97] There is a genuine desire on the part of most justices of the peace to improve the quality of justice in their courts. To this end they have shown concern for the defendant's rights and a sincere interest in protecting those rights.[98] In order to meet the criticisms of their dual role, they have expressed the need to have a county attorney serve as prosecutor in the trial of misdemeanor cases.[99] Many justices of the peace have resented being "used" as "collection agents" for creditors.[100]

Judicial reform of the justice of the peace courts appears inevitable. Whether the Mississippi legislature will initiate judicial reform, or whether the federal courts will force reform remains to be seen. If the Mississippi justice of the peace court is declared to be unconstitutional the legislature will be compelled to undertake some reform of the present system. The legislature and the courts should jointly share this responsibility.

Substantive laws can be no better than the courts applying them. It has been said that "[t]he way to improve the image of justice is to improve the reality of justice in the trial courts. . . ."[101] It is often difficult to convince the layman of the need for reform unless he has been an unfortunate victim of the system. For years members of the bar and legal scholars have criticized the justice of the peace courts.

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[95] *In re* Murchison, 349 U.S. 133, 136 (1955).

[96] *Id.*

[97] Dolan & Fenton, *supra* note 59, at 469-70.

[98] Interview with Kenneth R. Evans, Professor of Law, University of Mississippi, at the University of Mississippi, Sept. 4, 1973, discussing the views expressed at a seminar on June 5-6 & 12-13, 1973, which more than one-half of the justices of the peace in the State of Mississippi attended.

[99] *Id.*

[100] *Id.*

[101] THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 145 (Jones ed. 1965).

But, the perpetuation of this system of judicial administration is partly a matter of practical expedience. There is an undisputed need for a minor court. What is required is a change in form.[102] The justice of the peace could efficiently and economically handle misdemeanor cases and small claims, thereby affording relief to higher courts at a time when their dockets are already overcrowded. Such a court should be inexpensive to the litigants and still afford an adequate remedy at law. But there must be a standard of competence at all levels of the judicial heirarchy. If the legislature considers a situation important enough to enact a substantive law, then it is important enough to have a competent judge preside in the administration of that law. In stressing the need for reform in the justice of the peace courts, one writer made the following admonition: "Any court which leaves a man baffled, delayed, disgusted, and distrustful, makes an enemy of the established order, and should do so; and that court is most important in our political organization which has the most intimate contacts with the great masses of men."[103]

The ideal court would be economical in operation, and efficient and effective in judicial administration, without sacrificing "fundamental fairness" and without compromising a defendant's constitutional rights. The justice of the peace system is a practical compromise. The use of trained lawyers, sitting as judges only, and adequately salaried would help achieve the common goal of fairness and due process, without sacrificing the practicality of the present system. These changes would help arrest the loss of confidence in our legal processes, engendering public respect for the law. We do the justice of the peace no favor to perpetuate a system that brings continued criticism and ridicule upon him.

William Dean Stark

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[102] *See, e.g.,* Banyon, *Justice Courts on Trial,* 37 MICH. ST. B.J. 35 (1958); 47 IOWA L. REV. 1094, 1102 (1962).

[103] Keebler, *supra* note 63, at 5. *See also* H. JAMES, *supra* note 29, at 57; *The Justice of the Peace in Virginia, supra* note 76, at 153.

RECENT DECISIONS

Admiralty — Tort Jurisdiction — Jurisdiction Denied on Death Claim Resulting from Small Boat Accident on Navigable Waters

The libellant[1] brought this action in admiralty[2] against the Montana Power Company[3] for the death of George F. Adams who had drowned when a discharge from the power company's Hauser dam[4] capsized a small boat in which he was riding. The libellant claimed that this action was within the admiralty jurisdiction of the federal district court[5] because the incident occurred on navigable waters.[6] The District Court of Montana, *held,* where a tort occurs on navigable waters that are not in fact used for traditional maritime activities,[7] the tort claim should be dismissed for lack of admiralty jurisdiction. *Adams v. Montana Power Co.,* 354 F. Supp. 1111 (D. Mont. 1973), *appeal docketed,* No. 73-1371, 9th Cir., July 25, 1973.

The United States Constitution gave the federal judiciary power over "all cases of admiralty and maritime jurisdiction."[8] Admiralty tort jurisdiction has traditionally been thought to be bounded by locality.[9] Under the scope of the constitutional power granted, locality alone is sufficient to give a federal court admiralty jurisdiction over a tort which occurred on navigable waters.[10] Using the locality test of *The Plymouth*,[11] the "wrong and injury complained of must have been committed wholly upon the high seas or navigable waters,[12] or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction."[13] But the courts have not been consistent in determining whether the injury was consummated on navigable waters.[14] This has led, especially in more recent years, to increasing dissatisfaction with the locality test as the sole test for determining admiralty tort jurisdiction.[15] The Supreme Court[16] and Congress[17] have never considered the locality test as exclusive; nevertheless, some courts continue to mechanically apply it,[18] while other courts have turned to the locality plus maritime connection test[19] for determining admiralty tort jurisdiction. This test considers the fact that the tort occurred on navigable waters merely a prima facie test of admiralty jurisdiction.[20] In addition to the locality criterion, the test also requires some relationship between the tort and traditional maritime activities.[21] Most of the courts that have required a maritime connection have required only a minimum connection.[22] The Supreme Court, however, required a substantial maritime connection[23] when it applied the locality plus maritime connection test to claims arising from an airplane crash on inland navigable waters.[24] Another test that has been used for determining admiralty tort jurisdiction is the substantial maritime connection test.[25] This test looks to the following five factors: (1) the activities of the parties involved, (2) the relationship between the parties involved, (3) the causes of the injury, (4) the nature of the damages sustained, and (5) the location of the facilities in use. If all of these factors have a "substantial connection with maritime activities or interests," then admiralty jurisdiction would be justified.[26] These tests have freed the courts to look to the relation of the tort to maritime activities, as well as to the locality of the tort,[27] in determining the scope of admiralty jurisdiction.[28]

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[1] The libellant brought this action as administratrix of the deceased's estate.

[2] Admiralty jurisdiction enables a suit to be brought in federal court without proof of diversity of citizenship or jurisdictional amount. See Note, *New Guidelines for Admiralty Tort Jurisdiction,* 48 Ind. L.J. 87, 88-89 n.10 (1972) [hereinafter cited as *New Guidelines*], for a discussion of some of the other advantages afforded by admiralty jurisdiction.

[3] The Montana Power Company is a Montana corporation.

[4] Hauser dam and Holter dam are located in Montana on the Missouri River. These two dams are about 25 miles apart and they completely obstruct the river. This 25 mile stretch of the river is used by small boats, water skiers, swimmers, and fishermen only.

[5] 28 U.S.C. § 1333 (1) (1970) provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

[6] The term "navigable waters" is the key element in the locality test. Using this test, if a tort occurred on navigable water then admiralty jurisdiction automatically followed. Waters that are navigable in fact are within admiralty jurisdiction. Waters are navigable in fact when they (1) are currently used, (2) are capable of being used in the future by reasonable improvements, or (3) were capable of being used in the past as highways of commerce. Pitship Duck Club v. Town of Sequim, 315 F. Supp. 309, 310 (W.D. Wash. 1970).

[7] "Traditional maritime activities" is used to describe maritime service, navigation, and commerce on navigable waters.

[8] U.S. Const. art. III, § 2.

[9] DeLovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

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[10] *See* Death on the High Seas Act, 46 U.S.C. § 761 (1970).

[11] 70 U.S. (3 Wall.) 20 (1866) (admiralty jurisdiction denied to claims arising from a wharf fire caused by sparks from a burning vessel).

[12] For a history of the term "navigable waters," see The Propellor Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 43 (1851) (footnote supplied by author).

[13] 70 U.S. (3 Wall.) at 35.

[14] *Compare* Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388 (1886), *with* Post v. City of Lincoln, 25 F. 835 (S.D.N.Y. 1885). *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928), *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). *See also* The Blackheath, 195 U.S. 361 (1904).

[15] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); O'Conner & Co. v. City of Pascagoula, 304 F. Supp. 681 (S.D. Miss. 1969).

[16] Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).

[17] Admiralty Extension Act, 46 U.S.C. § 740 (1970). This act abrogated the locality test of *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), by providing a remedy in admiralty for damage done by vessels on navigable waters to land-based structures. The constitutionality of this Act was upheld in Gutierrez v. Waterman S.S. Co., 373 U.S. 206, *rehearing denied*, 374 U.S. 858 (1963).

[18] McCall v. Susquehanna Elec. Co., 278 F. Supp. 209 (D. Md. 1968) (discharge of water held behind a dam caused the decedent's boat down the river to capsize); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (swimmer injured by a surfboard); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (injuries to a water skier).

[19] McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961) (injury to a swimmer at a public beach); cases cited note 15 *supra*.

[20] Sidney Blumenthal & Co. v. United States, 30 F.2d 247, 249 (2d Cir. 1929).

[21] Cases cited note 15 *supra*; case cited note 19 *supra*.

[22] Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1126 & n.13 (5th Cir. 1972).

[23] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 261 (1972).

In the instant case the court observed that, although the locality rule was once generally accepted as the test for determining admiralty jurisdiction, *Executive Jet Aviation, Inc. v. City of Cleveland*[29] weakened the binding force of the term "navigable water" and freed the courts to base admiralty jurisdiction on the type of commerce using the particular body of water and on the needs of that commerce, rather than a description of the water. The court then concluded that since there was nothing resembling traditional maritime activity on this part of the river, the activities of swimmers, boaters, water skiers, and fishermen on these waters should not be regulated by the law of admiralty.[30]

The instant decision is representative of the growing trend in the case law to abolish, or at least modify, the locality test. There is little, if any, justification for extending admiralty jurisdiction to the tort claims of swimmers, boaters, water skiers, or fishermen where there is no general maritime interest in the effects of such accidents simply because these accidents occurred on navigable waters. Since the federal interest in the uniform application of maritime law as compared to the complex, and often unique, problems of the maritime industry is a major justification for maintaining a separate admiralty jurisdiction,[31] no test for determining tort jurisdiction can be effective unless it leads to results which are consistent with this purpose.[32] The locality of the tort and the maritime characteristics of that locality are important elements of any test for determining admiralty jurisdiction, but the test would not be completely effective unless it also required a sufficient connection between the tort and traditional maritime activities.[33] It appears that the instant court did not reach the question of whether the particular tort had a sufficient maritime connection to justify admiralty jurisdiction since the absence of any traditional maritime activity on this part of the Missouri River precluded any such connection. Nevertheless, the instant decision is important because it, along with the more recent decision in *Rubin v. Power Authority of the State of New York,*[34] extends the Supreme Court's adoption of the locality plus maritime connection test in *Executive Jet* to the tort claims of swimmers, boaters, water skiers, and fishermen that occur on internal waterways. *Executive Jet* could be construed as limiting the Supreme Court's adoption of the locality plus maritime connection test to airplane accidents; however, the Court indicated that the locality test "seems almost absurd" in other types of tort cases.[35] The Court cited with approval[36] *Chapman v. City of Grosse Pointe Farms*[37] and *McGuire v. City of New York,*[38] and neither of those cases involved airplane accidents. The instant decision and the *Rubin* case are logical and necessary extensions of *Executive Jet.* The locality plus maritime connection test allows courts to look to the facts, circumstances, and merits of each case, thus giving courts the flexibility that is necessary to achieve the purposes of admiralty jurisdiction. Without this flexibility, access to federal court would be allowed without regard to the amount in the controversy or the citizenship of the parties simply because of the fortuity that the tort occurred on navigable waters. The federal courts should not be burdened with every case involving the tort claims of swimmers, boaters, or water skiers.[39] Only those tort claims that have a sufficient maritime connection should be granted admiralty jurisdiction.

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[24] Justice Stewart spoke for a unanimous Court in *Executive Jet.*

[25] Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972).

[26] *Id.* at 1127.

[27] *New Guidelines, supra* note 2, at 100 n.88.

[28] Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973).

[29] 409 U.S. 249 (1972).

[30] The court dismissed the action for lack of jurisdiction. 354 F. Supp. at 1113.

[31] 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 14 (6th ed. A. Knauth 1940); G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 26-27 (1957).

[32] *New Guidelines, supra* note 2, at 92; Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259, 280 (1950).

Charles Fremont Johnson, III

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[33] Kelly v. Smith, No. 72-3285 (5th Cir., Aug. 28, 1973). In *Kelly* admiralty tort jurisdiction was granted to claims for personal injuries that resulted from an intentional injury. The court discussed the locality plus maritime connection test of *Executive Jet,* but the main question that was addressed by the court was whether there was a sufficient danger to maritime commerce to bring this incident within the substantial maritime connection requirement of *Peytavin.* It should be noted that if admiralty jurisdiction had been denied the suit would have been barred by the Mississippi statute of limitations.

The dissent notes that the progeny of *Executive Jet* may completely dispense with the maritime locality requirement.

[34] 356 F. Supp. 1169 (W.D.N.Y. 1973) (two divers drowned when they were drawn into the water intakes of a power generating plant).

[35] 409 U.S. at 255.

[36] *Id.* at 256.

[37] 385 F.2d 962 (6th Cir. 1967) (swimmer was injured when he dove from the side of a pier into 18 inches of water).

[38] 192 F. Supp. 866 (S.D.N.Y. 1961) (injury to a swimmer at a public beach).

[39] ALI Study of the Division of Jurisdiction Between State and Federal Courts 233 (1969).

CONSTITUTIONAL LAW — EQUAL PROTECTION — ALLOWING SEGREGATED SCHOOL GROUPS TO ENJOY "EXCLUSIVE" USE OF PUBLIC FACILITIES HELD UNCONSTITUTIONAL

Appellees[1] sought to have enjoined the City of Montgomery, Alabama's policy and practice of permitting racially segregated private schools and other segregated groups to use public recreational facilities. Appellees contended that this practice aided segregated groups in maintaining their discriminatory policies and in effect deprived appellees of rights guaranteed by the equal protection clause of the 14th amendment.[2] The city contended that it was not violating any constitutionally protected rights since it had made these facilities available to all groups on a nondiscriminatory basis. The United States District Court for the Middle District of Alabama granted appellees' requested relief with respect to *all* racially segregated private school groups and with respect to other private groups with racially discriminatory admissions policies, but refused to extend relief where the other private groups, although segregated, had no declared discriminatory admissions policies.[3] On appeal to the Fifth Circuit Court of Appeals, *held* remanded with directions. Where a city is under court order to integrate its public schools, a city practice that allows racially segregated private school groups to have "exclusive"[4] use of public recreational facilities is unconstitutional, but a policy allowing such use by other segregated private groups, regardless of admissions policies, is not. *Gilmore v. City of Montgomery,* 473 F.2d 832 (5th Cir. 1973), *petition for cert. filed,* 42 U.S.L.W. 3045 (U.S. May 10, 1973) (No. 72-1517).

The concept of equal protection of the laws was born of a desire to protect the recently emancipated Negro from the enforcement of the "Black Codes"[5] enacted in some Southern States immediately following the Civil War. With the adoption of the 14th amendment in 1868, it became unconstitutional for any state to deny equal protection of the laws to any person within its jurisdiction.[6] In the *Civil Rights Cases*[7] decided in 1883, the Supreme Court placed a limiting interpretation upon this provision when it noted: "It is State action of a particular character that is prohibited. Individual invasions of individual rights is not the subject-matter of the amendment."[8] Although the requirement of finding "state action" has persisted,[9] the dimensions of the concept remain unsettled.[10] In 1954, the Court in *Brown v. Board of Education*[11] found that separate educational facilities were inherently unequal and thus state-imposed segregation of public schools violated the equal protcetion clause.[12] In the wake of *Brown,* the Court found segregation unconstitutional in other public facilities as well.[13] Schemes to circumvent the *Brown* decision led the Court to warn that "[s]tate support of segregated schools through any arrangement, management, funds, or property . . ." was unconstitutional.[14] In the 1961 landmark decision of *Burton v. Wilmington Parking Authority,*[15] the Court held that where the state had involved itself "to some significant extent", *private* discrimination was prohibited by the equal protection clause.[16] The Court, however, declined to fashion a precise formula for the recognition of state responsibility for private discrimination when it stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true signficance."[17] As governmental responsibility for discrimination was more clearly perceived, the old "state action" formulation ceased to provide a reliable test for the limits of constitutional authority.[18] Whereas the states had previously been allowed to maintain a "neutral" posture in the dismantling of segregated school systems,[19] the Court in 1968 placed them under an "affirmative duty" to take whatever steps necessary to

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[1] The suit was brought as a class action by the appellees, Negro citizens of Montgomery, Alabama, on behalf of themselves and all others similarly situated.

[2] It should be noted here that Montgomery had been under court order to desegregate its public schools since 1964. Gilmore v. City of Montgomery, 473 F.2d 832, 834 (5th Cir. 1973).

[3] Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972).

[4] "Exclusive" use is defined by the court as that which results when a group is given sole possession of a facility (e.g., a baseball field, a football stadium) to conduct its activity. "Nonexclusive" use is defined as that which results when a group makes use of city facilities along with the general public (e.g., visits a zoo or museum, or attends a performance in a public auditorium). Gilmore v. City of Montgomery, 473 F.2d 832, 837 (5th Cir. 1973).

[5] The "Black Codes" were laws providing for the segregation of the races in public places. BALLANTINE'S LAW DICTIONARY 139 (3d ed. 1969).

[6] U.S. CONST. amend. XIV, § 1.

[7] 109 U.S. 3 (1883). The *Civil Rights Cases* consisted of five separate challenges to the Civil Rights Act of 1875, ch. 114, 18 Stat. 335. The Supreme Court declared

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the Act unconstitutional because it compelled "privately owned and operated facilities" to cease discrimination. Allowing the Act to stand, the majority reasoned, would empower Congress to enact laws governing the conduct of individuals regardless of whether they act in any type of official capacity. 109 U.S. at 13-14.

[8] 109 U.S. at 11.

[9] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[10] *See, e.g.,* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *See generally* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment.* 43 CORNELL L.Q. 375 (1958); Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966); Williams, *The Twilight of State Action,* 41 TEXAS L. REV. 347 (1963).

[11] 347 U.S. 483 (1954).

[12] *Id.* at 495.

[13] *See, e.g.,* Gayle v. Browder, 352 U.S. 903 (1956) (buses); Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

[14] Cooper v. Aaron, 358 U.S. 1, 19 (1958).

[15] 365 U.S. 715 (1961).

[16] *Id.* at 722.

[17] *Id.*

[18] *See, e.g.,* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966).

[19] *Cf.* Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination."

desegregate.[20] The mass exodus of white students from public schools to segregated private schools, or "white flight," was recognized as frustrating the right of black children to enjoy a desegregated public education.[21] The language of the courts got tougher,[22] and state involvement with private segregated schools became subject to special scrutiny.[23] The "effect" of the state action at issue on school desegregation became the standard of measure in determinations of whether or not equal protection had been denied.[24] Outside the field of education, however, the 1972 Supreme Court decision in *Moose Lodge No. 107 v. Irvis*[25] indicated that the Court has retained the degree-of-state-involvement test as its standard in determining whether or not private racial discrimination comes within the proscription of equal protection.

In the instant case the court found that "exclusive"[26] use of public recreational facilities by segregated private schools provided a means by which these schools could raise revenue,[27] allowed them to avoid large capital outlays,[28] and generally enhanced their attractiveness.[29] The court further found that this enhancement of private schools encouraged "white flight" from public schools and had an adverse "effect" on desegregation. Thus, permitting "exclusive" use of these facilities by segregated private school groups was found to be inconsistent with the city officials' affirmative duty to desegregate the public schools. The court went on to find that permitting "nonexclusive"[30] use of these facilities by segregated private schools did not involve the same degree of state action, and reasoned that since "nonexclusive" use did not aid these schools financially, such use did not present a sufficient enough threat to desegregated public education to support an injunction. The court further distinguished "exclusive" use of public recreational facilities by non-school groups on the basis that the city officials were under no affirmative duty to discourage racial discrimination by these groups. Relying on the language in *Moose Lodge*,[31] the court stated that the fact that a private group receives some benefit from the state does not *ipso facto* render discrimination by that group a violation of the equal protection clause. The court went on to find that in permitting such use by these non-school groups, the city had not "significantly" involved itself with the non-school groups' invidious discriminatory practices. Therefore, the court concluded that relief based on equal protection was limited to enjoining "exclusive" use of public recreation facilities by segregated private schools.

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[20] Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (freedom of choice struck down).

[21] *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 849 (5th Cir. 1966).

[22] *See, e.g.,* Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1181 (E.D. Va. 1969): "[*A*]*ny* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution." (emphasis in original); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967): "It is also axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

[23] *See* McNeal v. Tate County School Dist., 460 F.2d 568, 574-75 (5th Cir. 1972).

[24] Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). The Court stated that the correct test for determining "effect" is "whether it [the state action] hinders or furthers the process of school desegregation." *Id.* at 460; *accord,* Norwood v. Harrison, 41 U.S.L.W. 5094, 5097-98 (U.S. June 25, 1973) (State of Mississippi's policy of providing free textbooks to children attending segregated private schools held unconstitutional).

[25] 407 U.S. 163 (1972). In *Moose Lodge,* the Court held that state's granting of a liquor license to a private club did not involve the state to a "significant" enough extent in the club's discriminatory policies to constitute "state action" subject to the equal protection clause.

[26] Defined in note 4 *supra.*

[27] The schools could charge admission to athletic events.

[28] The schools did not have to build their own facilities.

[29] Use of the public facilities made it possible for these private schools to provide an extracurricular program comparable to that offered by public schools.

[30] Defined in note 4 *supra.*

Until someone comes up with an infallible, all-encompassing test for the identification of 14th amendment "state action", the area of state-private group relations will continue to be a fertile breeding ground for tough equal protection cases. Since the Supreme Court has itself admitted that to create such a test would be an "impossible task",[32] the courts will have to continue improvising in this difficult area. The court's decision to enjoin "exclusive" use of public recreational facilities by private segregated schools appears to square with the "effect" test[33] prescribed by the Supreme Court for use in this area and thus should stand up under review. In refusing to extend the injunction to cover *all* uses by these schools, the court has apparently sought to avoid the absurd results to which a strict application of the "effect" test could lead.[34] The creation of its "exclusive-nonexclusive" dichotomy is indicative of a desire on the court's part to strike a balance which, while protecting the right of black children to have an equal education, does not trample the personal rights of those children attending segregated private schools. While these intentions of the court have merit, the support which the court offers in favor of its approach is questionable.[35] Unless the Supreme Court insists, however, on a very strict application of the "effect" test, which in reality would be a declaration of war on segregated private schools, the "exclusive-nonexclusive" test should prove to be a useful tool for other courts in this area of equal protection. Of course the immediate practical effect of this decision is to burden those private segregated schools which do not already have their own athletic facilities. Either they will have to expend the funds necessary to build their own, or curtail their sports program. The latter course would lower their prestige and reduce their attractiveness, while the former might prove too much for those schools already hard-pressed financially. Thus, by making it more difficult and costly for segregated private schools to maintain discriminatory admissions policies, the court has indirectly provided encouragement for white students to return to the public schools.

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[31] It should be noted that *Moose Lodge* was decided *after* the lower court's decision in the instant case.

[32] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961), *citing* Kotch v. River Port Pilot Comm'rs., 330 U.S. 552, 556 (1947).

[33] *See* note 24 *supra.*

[34] For instance, protection by the local fire department certainly enhances the attractiveness of these schools. Would not a strict application of the "effect" test require the city to deny such protection?

[35] The court relies heavily on language from Everson v. Board of Educ., 330 U.S. 1 (1947), a first amendment establishment clause case — not an equal protection case.

The court's holding with regard to non-school groups appears to be a reasonable application of the rule stated by the Supreme Court in *Moose Lodge* and thus should also pass muster. It attests to the continuing vitality of the "state action" concept in this area and indicates that the court is not going to be quick to find "significant" state involvement in the activities of these private groups.

William McDonald Nichols

CONSTITUTIONAL LAW—EQUAL PROTECTION—ELIMINATION OF RACIAL DISCRIMINATION IN STATE EMPLOYMENT PRACTICES

Appellants, two Blacks who were denied employment with the Mississippi Highway Safety Patrol, brought an action under the 14th amendment[1] and under 42 U.S.C. sections 1981[2] and 1983[3] against the Commissioner of Public Safety seeking individual and class relief from racial discrimination by the Department of Public Safety in hiring and employment practices. Appellants contend that the fact that Blacks comprise 36.7 percent of the population of Mississippi, and that there are no, nor have there ever been any, black members of the Highway Patrol establishes a prima facie case that they were denied employment on the basis of their race. Appellee contends that the appellants were denied employment because of a general employment freeze caused by budgetary problems. The District Court of the Southern District of Mississippi entered a declaratory decree stating the rights of the appellants to equal employment practices, and an injunctive decree enjoining the appellees from certain racially discriminatory practices.[4] The district court, however, denied the specific individual relief of hiring and back pay for the appellants, as well as the general affirmative relief of minority preference hiring. On appeal to the Fifth Circuit Court of Appeals, *held,* affirmed. Specific individual relief is granted only when plaintiffs can demonstrate that but for their race they would presently be employed by the defendant. The specific form of relief to be granted is within the discretion of the district court, and will stand unless it can be shown that the court abused its discretion. *Morrow v. Crisler,* 479 F.2d 960 (5th Cir. 1973), *petition for rehearing granted,* No. 72-1136, (5th Cir., August 6, 1973).

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[1] U.S. CONST. amend. XIV, § 1.

[2] 42 U.S.C. § 1981 (1970) reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

[3] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] Defendants were enjoined from racial discrimination in processing applications for employment; using racially discriminatory tests; making employment standards

The 14th amendment guarantees to every citizen freedom from an abridgment or denial of federal rights by state laws, and the equal protection of the laws by the state government. Sections 1981 and 1983 are the congressional enactments of this constitutional provision. The main purpose of both the equal protection clause and the statutes was to eliminate racial discrimination by officials of the states.[5] Originally enacted as part of the Civil Rights Act of 1866,[6] section 1981 provides for equal rights for all persons to make and enforce contracts. Until recently, it had been seen as being applicable only to contracts under color of state law, but this restriction has recently been discarded.[7] Because employment relationships involve contracts, section 1981 has become an effective means to obtain relief from racial discrimination in employment practices.[8] Section 1983 was derived from the Civil Rights Act of 1871,[9] the ultimate purpose of which was to place the federal courts between the states and the people as a guardian of people's basic federal rights against state power.[10] Although section 1983 was originally passed in 1871, it was seldom used before 1939, and then only in voting rights cases.[11] Section 1983, however, is interpreted much more broadly today to fulfill its original purpose.[12] An action brought under section 1983 must involve a violation under the color of state law of either a

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more strict; giving preference to relatives of employees; and using certain recruiting films which imply discriminatory practices.

[5] McLaughlin v. Florida, 379 U.S. 184 (1964).

[6] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. This Act was modified and reenacted by the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, after ratification of the 14th amendment.

[7] Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970); *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[8] Comment, *A Survey of Fair Employment Practices in the Fifth Circuit,* 10 HOUSTON L. REV. 295, 310 (1973).

[9] Ch. 22, § 1, 17 Stat. 13.

[10] Monroe v. Pape, 365 U.S. 167 (1961); Dreyer v. Jalet, 349 F. Supp. 452 (S.D. Tex. 1972).

[11] Comment, *Civil Actions for Damages Under Federal Civil Rights Statutes,* 45 TEXAS L. REV. 1015, 1017-18 (1967). *See, e.g.,* Lane v. Wilson, 307 U.S. 268 (1939).

[12] *See, e.g.,* Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Classic, 313 U.S. 299 (1941) (section 20 of the Criminal Code, which was analogous to section 1983, was involved); Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969).

federal or a constitutional right.[13] Racial discrimination, whether direct or indirect, is forbidden.[14]

The first test used by the courts to detect discrimination was the "per se" test, where the court examined employment practices to determine whether on their face they violated the law.[15] This test, which was the simplest to administer, but yet the narrowest, was sufficient to determine direct discrimination. Since employment practices may still be discriminatory even though valid on their face, the "final impact" test was devised to detect indirect discrimination. This test looks beyond the form to the effect of employment practices. Neutral employment standards which exclude more Blacks than Whites operate as masked discrimination if they are not related to job performance.[16] Disproportionate ratios between Blacks and Whites, while not conclusive proof of past or present discriminatory hiring practices, do present a prima facie case of discrimination, and the weight of going forward with the evidence and the burden of persuasion is thus on the employer.[17] There are several types of neutral employment practices which may in fact be discriminatory: testing;[18] background requirements such as educational requirements,[19] work experience,[20] personal references,[21] and police records;[22] and selected recruitment.[23] In *Griggs v. Duke Power Co.,*[24] the Supreme Court held that no test used for hiring or promotion is valid if it operates to exclude Blacks and cannot be shown to be related to job performance.[25] The employer has the burden to demonstrate the business necessity of the test if it is discriminatory in its effects.[26]

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[13] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

[14] In Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) the court stated:

> Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disasterous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id. at 497.

[15] Comment, *Tests for Discrimination in Employment,* 28 WASH. & LEE L. REV. 194, 198 (1971).

[16] Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971) (mem.); *see* Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972).

[17] United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); *see* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972).

[18] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971) (mem.).

[19] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[20] United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

[21] Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); *see* United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).

[22] Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).

[23] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

[24] 401 U.S. 424 (1971).

A test is job-related only if it can be shown that the test reasonably predicts which applicants possess the reasonably necessary job skills and traits.[27] Hiring practices, if related to ability to perform, are not in themselves unfair even if it means that the disadvantaged minorities are in fact adversely affected.[28] When an employer imposes background requirements, however, which can be met by relatively few minority group members, the requirements are suspect, and in order to stand must be shown to relate to productivity.[29] Selected policies of recruitment and advertising directed toward Whites serve to restrict minority employment,[30] as does reliance on present workers to refer new employees.[31] These methods are discriminatory since Blacks cannot apply for job openings which they do not know about. In *Griggs,* the Supreme Court stated that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."[32] Courts not only have the power but the duty to render a decree which will eliminate the discriminatory effects of the past as well as bar discrimination in the future.[33] Without such powers, courts would be unable to effectuate the desires of Congress in eliminating discrimination.[34] The courts, therefore, may order such affirmative action as may be appropriate,[35] including injunctive relief against future discriminatory practices;[36] compensation to the individual plaintiff for loss of wages, seniority, and training which had been denied him;[37] imposition of a minority preference or a quota system of hiring;[38] and requirement of minority recruitment programs.[39] "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[40] Yet, the use of such power to effectuate relief should be exercised with sensitivity and restraint.[41] Formulating appropriate relief for racial discrimination is within the discretion of the trial judge,[42] and the appellate court will allow that remedy to stand unless it can be shown that the trial judge abused his discretion.[43]

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[25] *Id.* at 431.

[26] United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); *see* Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

[27] United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

[28] Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355, 1358 (D. Mass. 1969); *see* Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

[29] *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1141 (1971); *see* Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355 (D. Mass. 1969).

[30] *See* United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir. 1970), *cert. denied,* 400 U.S. 943 (1970). *See also* Olson, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 20, 57 (1970).

[31] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

[32] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[33] Louisiana v. United States, 380 U.S. 145, 154 (1965); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); *see* Smith v. YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972); United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971).

[34] United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971).

[35] Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972). The court states that remedies used in Title VII cases offer practical guidelines in dealing with racial discrimination under section 1981. *Id.* at 329.

[36] Smith v. YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972); *see* United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971); Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971).

In the instant case, the court held that since the question of whether an employment freeze existed was a question of fact to be determined by the trial judge, and since the appellants failed to demonstrate that but for the racially discriminatory hiring practices of the defendants they would be presently employed, individual affirmative relief of employment, back pay, and other benefits must be denied. As to class relief, the court held that since the district court has broad powers to eliminate the discriminatory effects of the past as well as to ban discrimination in the future, and since the eventual test of the district court's remedial power is its reasonableness and its workability, the district court has great discretion in the use of such powers. Since there has been no proof that the district court abused its discretion either in the relief that was ordered, or in the failure to order all of the relief requested, and since it cannot be determined that the relief ordered will not achieve the remedy to which the appellants are entitled, the court concluded that the district court's decree was an exercise of power within its discretion.

In a lengthy and vigorous dissent, Judge Goldberg attacked the majority opinion by stating that injunctive relief alone was insufficient to correct the present effects of past discrimination. He reasoned that since the decisions which spoke of the broad powers of the district court in formulating equitable relief were from appellate courts which upheld district courts that ordered such relief; these decisions should not be read as giving the district court discretion as to whether the affirmative relief is to be granted, but rather as a reaffirmation of the duty to impose affirmative relief. Additional relief was required in the present case, he believed, because of both statistical evidence of obvious and extensive racial discrimination and the important public character of the Highway Patrol. While Judge Goldberg agreed with the majority that the issue to be decided was whether sufficient equitable relief was granted by the district court, he argued that the burden of proving insufficiency should not be on the plaintiff where, as in the present case, the effects of past discrimination have been so great.

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[37] United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); *see* Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

[38] NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); *see* United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *See also* Note, *Title VII and the Quota System — A New Approach to a Belabored Problem,* 4 RUTGERS CAMDEN L.J. 113 (1972).

[39] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir. 1970).

[40] Swann v. Board of Educ., 402 U.S. 1, 15 (1970). The Supreme Court affirmed a district court's decision ordering broad affirmative relief to end racial discrimination within a school system.

[41] *See, e.g.,* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[42] Adams v. Miami Police Benevolent Ass'n, 454 F.2d 1315 (5th Cir. 1972).

[43] Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

Although in the instant case the court found discriminatory employment practices and ordered injunctive relief to prevent further discrimination, an analysis of the majority decision discloses a more restricted approach taken than in other employment discrimination cases. This deviation is in two major areas: the test of whether an employment practice is discriminatory; and the relief granted to eliminate the discriminatory effects of past practices as well as to ban discrimination in the future. The test used to determine whether the appellants had been discriminated against was whether "but for" the fact that appellants were black they would be presently employed with the Department of Safety. This test is much narrower than tests used by other courts. In *Cooper v. Allen*[44] it was held that statistical evidence made a prima facie case of discrimination by the city and that the plaintiff was entitled to relief unless the city could show by clear and convincing evidence that he would not have been hired even absent the discriminatory requirement.[45] Had the present court adopted the *Cooper* test, the Department of Safety would have to show by clear and convincing evidence that the appellants would have been refused employment even if they were white. As compared to the *Cooper* test, the test of the present court substantially increases the plaintiffs' burden of proof, and as a result discrimination is more difficult to prove.

Just as the test of discrimination applied is more restrictive than other tests currently being utilized, so was the relief granted. Although the district court provided the maximum injunctive relief available,[46] it failed to require any transitional protective measures such as minority preference hiring or ratio hiring to more quickly eliminate remnants of past discriminatory practices. A trial court is not obligated to follow any particular past course since the evil sought to be eliminated and the willingness of the parties to co-operate in seeking the goal affect the method chosen to achieve equal employment.[47] In determining the extent of the additional affirmative relief to be granted, the trial judge must weigh the necessity of immediately erasing remnants of past discrimination against the possible infringement of rights of Whites seeking employment.[48] If the trial court used these criteria, it is difficult to understand why it failed to impose a stronger remedy. The evil sought to be eliminated was that of discrimination within the Highway Patrol, an important government agency which requires the confidence of all the people of the state. The fact that there had never been any black members of the Highway Patrol demonstrated the Department's lack of willingness to end discriminatory employment practices. The two conflicting considerations of the infringement of non-minority persons' rights and the immediacy of correcting the present effects of past wrongs could have been accommodated by the imposition of hiring by racial quotas for a limited time or until there is an approximate representation of Blacks on the Patrol consistent with the population of the locale.[49] Instead of requiring such measures, however, the district court transferred its discretion of choosing the means to achieve the required ends to the Department of Safety to give the Department flexibility in implementing the requirements of non-discriminatory employment procedures. It did so on the basis that the decree was subject to revision if it failed to accomplish its purpose. While such flexibility will aid the Department in implementing the decree, a grant of such flexibility at the expense of immediacy seems unwarranted. The court's failure to impose temporary minority-preference hiring requirements freezes the effects of past discriminatory practices. Yet the court is under an affirmative duty to eliminate not only present discriminatory practices but also present remnants of past discrimination, and this duty must outweigh the trial court's discretionary formulation of a remedy. The present decision lessens the extent of relief which the district court judge is required to impose, and gives him greater leeway in shaping the relief to fit the local conditions. Because appellate courts continue to be reluctant to tamper with the trial judge's discretion when such discretion is not clearly abused, the relief granted from employment discrimination cases will continue to be inconsistent and dependent upon the judgment of the individual trial judge. If the restrictive approach of the present case is followed, discrimination in employment practices will be more difficult to prove, and the relief granted will be inadequate to promptly erase the existing effects of past discrimination.

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[44] 467 F.2d 836 (5th Cir. 1972).

[45] *Id.* at 840; *see* Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971) where the court held that statistical evidence can make a prima facie case of discrimination which must be rebutted by the employer. In Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), the court went even further in holding that where a Black is qualified for a job opening but is refused employment, a prima facie case of racial discrimination is established.

[46] *See* note 4 *supra.*

[47] *See* Smiley v. City of Montgomery, 350 F. Supp. 451 (M.D. Ala. 1972).

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[48] Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1972).

[49] *E.g.,* NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) where the court required hiring on a one-to-one ratio until 25 percent of the State Trooper force is black. *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972) where a flexible hiring ratio was imposed until 20 Blacks were hired.

LABOR LAW — EQUAL PAY ACT — ECONOMIC BENEFIT TO EMPLOYER IS JUSTIFICATION FOR WAGE DIFFERENTIAL BETWEEN MALE AND FEMALE EMPLOYEES

The Secretary of Labor sought an injunction[1] against Robert Hall Clothes, Inc.[2] alleging that the store had violated the Equal Pay Act[3] by paying the salesmen who worked exclusively in the men's department a higher rate of pay than the saleswomen who worked exclusively in the women's department even though the work performed was substantially equal. Since the men's department was more profitable,[4] Robert Hall contended that it was justified in paying the salesmen more; therefore, the wage differential between salesmen and saleswomen was based on a factor other than sex which constituted an exception, section 206 (d) (1) (iv), to the Equal Pay Act. The Secretary of Labor contended that economic benefit to the employer is not an acceptable justification for a wage differential under section 206 (d) (1) (iv) because it is not related to job performance or typically used in setting wage scales. The District Court of Delaware held that the wage differential between the part-time salesmen and saleswomen was not justified, but that the store was justified in paying the full-time saleswomen less than the full-time salesmen because of economic benefits to the employer.[5] On appeal to the Third Circuit Court of Appeals,

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[1] Using the enforcement provisions of the Equal Pay Act, the Secretary was seeking an injunction against future violations and the withholding of back pay. *See* 29 C.F.R. §§ 800.164-.166 (1972).

[2] Robert Hall Clothes, Inc., named as a defendant, is a Delaware corporation with its main office in New York. The corporation has several wholly owned subsidiaries. One of these, Robert Hall Clothes of Jamaica, Inc., owns Robert Hall Clothes Greenbank Corp., the other defendant and the subject of this litigation. Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264, 1267-68 (D. Del. 1971).

[3] The Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act of 1938, provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206 (d) (1) (1970).

[4] The men's department carried more expensive merchandise which resulted in a gross profit of $148,001.30 in 1969 as compared to a gross profit in the women's department of $92,686.87. The records produced were for 1963 through 1969 and showed similar discrepancies between the departments for each year. Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264, 1276 (D. Del. 1971).

[5] The district court based its decision on the premise that the relevant figures were those relating economic benefit to the employer by the individual salesperson.

held, affirmed as to the full-time personnel and reversed as to the part-time personnel. Where there is a valid business reason for an occupation qualification based on sex, a wage differential based on economic benefit to the employer is recognized as a factor other than sex and, therefore, not a violation of the Equal Pay Act. *Hodgson v. Robert Hall Clothes, Inc.,* 473 F.2d 589 (3d Cir. 1973), *cert. denied,* 42 U.S.L.W. 3186 (U.S. Oct. 9, 1973) (No. 72-1615).

At the beginning of the 20th century, women represented 18 percent of the American labor force. By 1966 this figure had doubled. Instead of promoting equality between the sexes, the rising employment rate of women often had the opposite effect. Women were relegated to certain jobs and paid less than men performing similar work.[6] A few states passed laws requiring equal pay for males and females performing the same work, but Federal legislation was not passed until the Equal Pay Act of 1963.[7] The purpose of the Equal Pay Act[8] was to give women equal rights in the economic area and eliminate sex-based wage discrimination, with its corresponding stigma of inferiority. The Act also sought to alleviate the depressing effects which reduced wages for women have on living standards.[9] For the first 6 years the Act encountered resistance in the courts,[10] and informal compliance was scattered and reluctant.[11] When the courts were called upon to interpret the Act's provisions, the

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Ordinarily Robert Hall did not keep such records. The only individual records available represented two 10-week periods out of the 6 years involved in the suit. *Id.* at 1278.

[6] Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963,* 20 HASTINGS L.J. 305, 305-08 (1968).

The median income of women fluctuated between 63.9 percent and 58 percent of men's income between 1955 and 1968. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970,* 39 U. CIN. L. REV. 615, 616-17 (1970).

[7] 29 U.S.C. § 206 (d) (1) (1970). The Equal Pay Act was passed as an amendment to the Fair Labor Standards Act of 1938, Pub. L. No. 718 (June 25, 1938). For the guidelines on coverage of the Fair Labor Standards Act and the Equal Pay Act *see* 29 C.F.R. §§ 800.0, .5 to .12 (1972).

[8] *See* 109 CONG. REC. 8702 (daily ed. May 23, 1963). For some of the legislative history of the Equal Pay Act see 109 CONG. REC. 8683-8707 (daily ed. May 23, 1963).

[9] Shultz v. Wheaton Glass Co., 421 F. 2d 259, 265 (3d Cir. 1970), *cert. denied,* 398 U.S. 905 (1970). The Civil Rights Act of 1964 also prohibited discrimination based on sex in employment practices. *See* 42 U.S.C. § 2000 e-2 (1970).

[10] As one commentator has noted:

> A review of the early Equal Pay Act cases in the district courts conveys . . . an unwillingness on the part of federal judges to separate their own manhood and their lifelong impressions of the role of women in society from their duty as judges to interpret the law as written.

Sangerman, *A Look at the Equal Pay Act in Practice,* 22 LAB. L.J. 259 (1971). *See* Wirtz v. Muskogee Jones Store Co., 293 F. Supp. 1034 (E.D. Okla. 1968); Wirtz v. American Can Co.—Dixie Products, 288 F. Supp. 14 (W.D. Ark. 1968), *rev'd sub nom.* Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970).

[11] Murphy, *supra* note 6, at 616.

term "equal" job[12] presented the most problems.[13] Unequal work was the most frequently cited excuse for wage differentials. In *Wirtz v. Wheaton Glass Co.,*[14] the District Court of New Jersey interpreted equal to mean "substantially identical" with reference to compared jobs.[15] Since jobs are seldom identical, the *Wheaton* interpretation was a major stumbling block for effective enforcement of the Act.[16] The major breakthrough came with a forcefully written opinion reversing *Wheaton* in which the Third Circuit Court of Appeals declared that men and women who do "substantially equal" work should be paid equally, and that "[a]ny other interpretation would destroy the remedial purposes of the Act."[17] The Act is now being vigorously enforced by the Labor Department.[18] If the work done by males and females is found to be equal and the pay unequal, the employer must bring himself within one of the four exceptions to avoid violating the Act.[19] The most litigated exception is section 206 (d) (1) (iv), the broad exception which permits wage differentials "based on any other factor other than sex."[20] Since section 206 (d) (1) (iv) could be abused by the employers, the courts have been closely examining the circumstances surrounding wage differentials when this clause is raised as a defense.[21] In order to prevent such abuses the courts look at the actual performance and requirements of the job.[22] In *Shultz v. Wheaton Glass Co.,*[23] a showing that the flexibility of male employees was of some unmeasured advantage to the employer was not a factor other than sex and did not justify a 10 percent wage differential over female employees performing substantially equal work. In another recent decision the Fifth Circuit Court of Appeals found that a vague training program for males was largely illusory and only an excuse to pay males more than females doing equal work.[24] Similarly, an Arkansas district court found a job classification system of "heavy" work for males and "light" work for females to be arbitrary and to serve no purpose but to hide a prohibited wage differential.[25] Another court discovered that higher wages paid to workers on a night shift had never been regarded as compensation for night work but had been established because men refused to work the day shift for the low pay rate of women.[26]

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[12] Four criteria are used to determine whether compared jobs are equal: (1) Equal skill "includes consideration of such factors as experience, training, education, and ability" measured in terms of job requirements. 29 C.F.R. § 800.125 (1972). *See, e.g.,* Shultz v. Kimberly-Clark Corp., 315 F. Supp. 1323, 1332 (W.D. Tenn. 1970). (2) Equal "[e]ffort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." 29 C.F.R. § 800.127 (1972). *See, e.g.,* Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970). (3) Equal responsibility concerns "the degree of accountability required in the performance of the job, with emphasis on importance of the job obligation." 29 C.F.R. § 800.129 (1972). *See, e.g.,* Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970). (4) Similar working conditions is determined by a "practical judgment . . . in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels." 29 C.F.R. § 800.131 (1972). *See, e.g.,* Wirtz v. Basic Inc., 256 F. Supp. 786, 790-91 (D. Nev. 1966).

[13] Murphy, *supra* note 6, at 623.

[14] 284 F. Supp. 23 (D.N.J. 1968), *rev'd sub nom.* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).

[15] *Id.* at 32.

[16] Wirtz v. Rainbow Baking Co., 303 F. Supp. 1049, 1052 (E.D. Ky. 1967).

[17] Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied,* 398 U.S. 905 (1970) (The Secretary of Labor proved that male selector-packers were being paid 10 percent more than female selector-packers for performing the same work. Occasional additional work performance by the male selector-packers was also done by snap-up boys paid about the same as female selector-packers and therefore the 10 percent wage differential was not justified).

[18] Sangerman, *supra* note 10, at 265.

[19] 29 U.S.C. §§ 206 (d) (1) (i) - (iv) (1970). There are three specific exceptions to the Equal Pay Act: (1) a seniority system. *See, e.g.,* Kilpatrick v. Sweet, 262 F. Supp. 561, 564 (M.D. Fla. 1967). (2) a merit system. *See* 29 C.F.R. §§ 800.140, .144 (1972); Hodgson v. The Washington Hospital, 65 CCH LAB. L. REV. ¶ 32,499 (W.D. Pa. 1971). (3) a system for measuring earnings by quantity or quality of work. *See* 29 C.F.R. §§ 800.140, .144 (1972).

[20] This broad exception was included because it was impossible to list every exception. 109 CONG. REC. 8699 (daily ed. May 23, 1963).

In the instant case the court reasoned that since the statute provided that exceptions to the Equal Pay Act applied to males and females performing equal work, Congress intended to allow justifiable wage differentials between such employees. Further, the court found that the basis of the wage differential may be a factor not related to job performance as evidenced by the exceptions regarding wage differentials based on seniority, section 206 (d) (1) (i), and "any other factor other than sex," section 206 (a) (1) (iv). Neither of these are necessarily related to job performance.[27] The court cited section 206 (d) (1) (iv) and stated that the economic benefit to the employer was a legitimate business reason and a factor other than sex, thus allowing the employer to pay salesmen more than saleswomen performing equal work. The court also noted that segregation of the salespeople was justified by a valid business reason, therefore not contravening Title VII of the Civil Rights Act.[28] The court concluded that it was unnecessary for the employer to justify his base salary by correlating it to individual performance.[29] Since the men's department was more profitable than the women's department, the court reasoned that the wage differential was justified and therefore a "clear pattern of discrimination"[30] did not exist.

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[21] The Labor Department lost most of its early Equal Pay Act cases. A major contributing factor to these losses was misapplication of section 206 (d) (1) (iv). Murphy, *supra* note 10, at 623. *See, e.g.,* Wirtz v. American Can Co.—Dixie Products, 288 F. Supp. 14 (W.D. Ark. 1968), *rev'd sub nom.* Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970).

[22] *See* 29 C.F.R. § 800.121 (1972).

[23] 421 F.2d 259 (3d Cir. 1970), *cert. denied,* 398 U.S. 905 (1970).

[24] Shultz v. First Victoria Bank, 420 F.2d 648 (5th Cir. 1969).

[25] Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970).

[26] Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).

The following are not allowed as bases for wage differentials for otherwise equal jobs because they are based on sex: that the employee is head of a household, 29 C.F.R. § 800.149 (1972); that women cost more to employ, 29 C.F.R. § 800.151 (1972); that legal restrictions in state or other laws limit the number of hours, weight-lifting, and rest periods for women, 29 C.F.R. § 800.163 (1972).

[27] The court quickly dismissed the Secretary's other contention that the factor other than sex must be "one typically used in setting wage scales" by saying that economic benefit was probably used by employers in setting wage scales. The Secretary had not included this test until his reply brief in this appeal.

The decision in the instant case could have a detrimental effect on the efficacy of the Equal Pay Act. The court was faced with striking a balance between freedom for the employer to set his own pay standards and the need to end discrimination based on sex. The former policy apparently prevailed. Economic benefit to the employer may be proper justification for wage differentials. However, since it is well-known that women, in general, will do the same work for less pay than men, it is possible that economic benefit to the employer was not Robert Hall's true motive for paying saleswomen less than salesmen.[31] Although the store is departmentalized, it is still a unit,[32] and it can be argued that the success of one department depends to some extent on the other.[33] Therefore, the true value of one department may be incapable of valid measurement, and salespersons performing equal work in each department should be paid according to the income of the store as a unit. If the employer is allowed to use economic benefit as a justification for pay differentials, the correlation should be strictly on an individual basis and substantiated by individual records. A flat salary based on each department's profit assumes that each salesman is making more profit for the store than each saleswoman. A useful analogy can be found in the claim that wage differentials are justified because women cost more to employ than men. This has been held to be a violation of the Equal Pay Act because it groups employees on the basis of sex, and thus assumes that the factor of sex alone justifies the pay differential. By grouping employees on the basis of sex the group cost is assessed against the individual of one sex without considering whether that person actually costs more to employ than a specific person of the opposite sex.[34] Further, in order to meet the requirements for the exception of any factor other than sex, sex can provide no part of the basis for the wage differential.[35] In the instant case, it cannot be said that these requirements were met since the employees were grouped on the basis of their sex. In *Robert Hall* the court refused to follow the lead of the cases immediately preceding it which delved into the justifications for wage differentials to discover evidence of discrimination. If the Equal Pay Act is to be effective, the courts must discover the motive for paying women less, not just accept the employer's excuse at face value. *Robert Hall* may represent a step backward for the Equal Pay Act and the ramifications of the decision should be carefully studied before it is allowed to stand. This decision could be broadly construed to enable an employer to undermine the Act by justifying his wage differentials with a general assertion that male employees are of more economic benefit. If economic benefit is allowed as an exception to the Act, it should be strictly correlated to individual employees, and the courts must be alert for patterns of discrimination against one sex. Otherwise, economic benefit to the employer, as an exception to the Equal Pay Act, could be the loophole through which the whole purpose of the Act could disappear.

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[28] Since physical contact was necessary, the jobs were segregated on the basis of sex to avoid embarrassment to the customers which would inhibit sales. *See* 42 U.S.C. § 2000e-2 (h) (1970). Wage classification systems which designate certain jobs as "female" jobs and others as "male" jobs may contravene Title VII of the Civil Rights Act of 1964 except in certain instances where sex is a bona fide occupational qualification necessary to normal operation of a business. 29 C.F.R. § 800.114 (1972). For guidelines for harmonizing the Civil Rights Act with the Equal Pay Act see 29 C.F.R. § 1604.7 (1972).

[29] The district court had used individual performances as the basis of its decision; *see* note 5 *supra.*

[30] 109 CONG. REC. 8697 (daily ed. May 23, 1963) (remarks of Representative Goodell).

The dissent in the instant case insisted that the court was bound by the findings of fact of the lower court. The Secretary had made out a prima facie case against Robert Hall by showing discrimination on an individual basis with regard to the part-time saleswomen. The dissent reasoned that the burden was on Robert Hall to prove that the wage differential was based on a factor other than sex, and that this burden was not satisfied by general assertions of economic benefits.

[31] Saleswomen make 40.5 percent of the income of salesmen. *See* Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), *aff'd sub nom.* Brennen v. City Stores, Inc., 21 Wage & Hour Cas. 69 (5th Cir. 1973). This department store had violated the Equal Pay Act by hiring saleswomen for less pay than salesmen performing equal work. Some of the justifications given by the defendant were that the wage differentials "resulted from traditional and historical differences in job content," and "the scale prevalent in the labor market." The court replied:

> The fact that women tend to receive less from the labor market as a whole . . . carries no weight since defendant may not justify its discrimination by pointing to the conduct of others. The fact that the defendant has succeeded in paying a low, labor market rate does not authorize that which the Act seeks to end: wage differentials within its store between equivalent jobs.

Id. at 949-50. *See* Hodgson v. Corning Glass Works, 474 F.2d 226, 233-35 (2d Cir. 1973); Shultz v. Brookhaven General Hospital, 436 F.2d 719, 726 (5th Cir. 1970).

[32] *See* 29 C.F.R. § 779.304 (1972).

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[33] For example, women often buy their husband's clothes while shopping for their own, and families often shop together; therefore, many people would find a department store more convenient.

[34] 29 C.F.R. § 800.151 (1972).

[35] 29 C.F.R. § 800.142 (1972).

TAXATION — PRIVILEGE AGAINST SELF-INCRIMINATION — ATTORNEY MAY NOT CLAIM PRIVILEGE IN CLIENTS' BEHALF TO DEFEAT SUMMONS FOR RECORDS IN HIS POSSESSION

Appellant, an attorney, was issued a summons[1] by the Internal Revenue Service that commanded him to exhibit certain papers he had received from his clients' accountant,[2] pertaining to his clients' tax liability for the years 1966-69. The government petitioned the U.S. District Court for the Southern District of Texas for the enforcement of the summons[3] when appellant refused to produce the work papers.[4] At the enforcement proceeding, appellant asserted the fifth amendment privilege against self-incrimination[5] in behalf of his clients. The district court found that the fifth amendment did not protect taxpayers from the compelled production of incriminating documents in the possession of their attorney, and ordered appellant to comply with the summons. On appeal to the Fifth Circuit, *held,* affirmed.[6] Where taxpayers themselves would not be able to assert the fifth amendment privilege against self-incrimination to bar the production of papers owned and prepared by their accountant and in the possession of their attorney, the necessary compulsion against such taxpayers to permit their attorney to invoke the privilege in their behalf also is missing. *United States v. White,* 477 F.2d 757 (5th Cir. 1973).

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[1] The summons was issued under the authority of INT. REV. CODE OF 1954, § 7602. Section 7602 provides in part that the Secretary or his delegate may summon any person in possession of books, records, or other data relating to the business of a person liable for tax to appear before the Secretary or his delegate and produce the books and records, for the purpose of determining the internal revenue tax liability of the person liable for tax. For an analysis of the section 7602 summons see Lipton & Petrie, *Subpoena Powers of the Internal Revenue Service,* 37 WIS. B. BULL. 34 (Dec. 1964).

[2] When taxpayers learned that they had become the object of a special investigation, they retained appellant as counsel. Appellant immediately obtained from taxpayers' accountant all of the documents relating to taxpayers' finances. Appellant agreed to return the documents to the accountant when they were no longer needed in his representation of taxpayers.

[3] The petition was made pursuant to INT. REV CODE OF 1954, §§ 7402(b), and 7604(a). The combined effect of sections 7402(b) and 7604(a) is to confer jurisdiction to enforce an internal revenue summons to appear, testify or produce records in the United States district court for the district in which any person summoned under the internal revenue laws resides or may be found.

[4] The papers sought by the government were work papers used by the accountant in preparing taxpayers' returns for the years 1966-69. *See* United States v. Zakutansky, 278 F. Supp. 683 (N.D. Ind. 1968), *aff'd,* 401 F.2d 68 (7th Cir. 1968), *cert. denied,* 393 U.S. 1021 (1969), where the court held that "columnar work papers and adding machine tapes showing the taxpayer's income and expenditures" were within the definition of work papers. 278 F. Supp. at 684.

[5] U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[6] As a separate ground for reversal, appellant argued that the summons was issued for the improper purpose of obtaining evidence for the criminal prosecution of taxpayers. Since the district court found that the summons was issued in good faith, prior to a recommendation for criminal prosecution, to aid the Service in determining taxpayers' correct tax liability, the instant court held that the summons was issued within the purposes authorized by section 7602 and within the guidelines established in Donaldson v. United States, 400 U.S. 517 (1971). *See* note 41 *infra.*

English disdain for the ex officio oaths of the ecclesiastical courts and the incriminating questions of the early common law courts culminated in the idea that no man should be compelled to accuse himself;[7] an idea that became embedded in American jurisprudence as the privilege against self-incrimination.[8] A person summoned to court in colonial America to answer interrogatories was not, however, afforded the privilege to the extent that it is now enjoyed.[9] The drafters of the fifth amendment, although they chose the words "in any criminal case," purposed that the privilege against self-incrimination extend to witnesses as well as to the accused and to both civil and criminal cases.[10]

Although the fifth amendment privilege against self-incrimination is expressed in a few seemingly explicit words, the courts have struggled with the language of the privilege and have yet to render a definitive opinion as to how far and to whom the privilege extends. The courts have, however, rendered a great number of decisions which, when added together and examined as a body of law, provide immeasurable guidance in determining the ambit of the privilege. The purpose of the fifth amendment is to interdict the compulsion of self-accusatory testimony from a witness.[11] It applies in any proceeding where an answer to the question propounded might tend to expose the witness to criminal responsibility[12] or "furnish a link in the chain of evidence" necessary to show that the witness has committed a crime.[13] The privilege is personal to the witness and is intended for his benefit only,[14] must be construed liberally,[15] and permits no presumption to be made against the witness because of his failure to testify;[16] but, the court may require a witness to answer a question that, in its perception, is not incriminatory.[17] No necromantic language is necessary to invoke the privilege; all that is required is that the witness show the court his intent to decline to answer a question on fifth amendment grounds.[18] The fifth amendment requires that a person suspected of a crime be apprised of his constitutional right to refuse to incriminate himself,[19] however, the privilege is waived unless it is invoked by the witness.[20]

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[7] C. McCormick, McCormick's Handbook of the Law of Evidence § 116 (2d ed. 1972); 8 J. Wigmore, Wigmore on Evidence § 2250 (McNaughton rev. ed. 1961).

[8] U.S. Const. amend. V.

[9] *See* L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 333-67 (1968). Levy states that the Massachusetts Body of Liberties of 1641 was one of the earliest colonial attempts to create a bill of rights and that ". . . Liberty 45 provided in somewhat equivocal terms for the right against self-incrimination: 'No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured yet not with such Tortures as be Barbarous and inhumane.' . . ." *id.* at 345.

After the Declaration of Independence, many states included in their bills of rights a clause resembling, in some measure, the fifth amendment privilege against self-incrimination. *Id.* at 405-06. The wording and intent of the state constitutional guarantees, along with the recommendations of the states ratifying the Constitution and debate among the members of the House and Senate, finally lead to the adoption of the federal Bill of Rights and its privilege against self-incrimination. *Id.* at 416-32.

[10] L. Levy, *The Right Against Self-Incrimination: History and Judicial History in* Judgments: Essays on Constitutional History 265, 275 (1972). The drafters probably intended that the privilege protect a witness whose answer would subject him to public infamy, but the privilege has not been so interpreted. *Id.* at 276.

[11] Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892).

In an early case, the Court recognized that compelling a person to surrender his books and records for use as evidence against him was the same as compelling him to be a witness against himself and held that the privilege operates to exclude incriminating documents as well as self-accusatory testimony.[21] This rule operates to confer upon one in possession of documents all the component rights that combine to constitute the privilege against self-incrimination.[22] Thus, one in possession of personal records that might tend to incriminate him can not be compelled to produce them.[23] A person can be compelled, however, to produce documents possessed by him in a representative capacity[24] even though the possessor might be incriminated by their production, since the privilege is personal to the witness and protects only documents that are his personal property and are in his personal possession.[25] Also, documents required to be kept by law for governmental regulatory and enforcement purposes may be compelled in spite of their incriminatory nature.[26] The question of whether the taxpayer can claim the fifth amendment privilege to protect incriminatory tax records usually arises in the course of an Internal Revenue Service audit to determine if the taxpayer has correctly disclosed his civil tax liability.[27] At the initial stage of the examination — where the taxpayer is only subject to a civil penalty — the fifth amendment privilege is not available to the taxpayer.[28] If, however, the auditing agent discovers irregularities, the case is referred to an intelligence unit to investigate possible criminal violations.[29] Since the privilege against self-incrimination applies to documents as well as testimony, the taxpayer may successfully refuse to produce to the investigators documents created, owned and possessed by him.[30] Where the facts do not disclose compliance with the requisite elements of creation, ownership, and possession, however, the courts are frequently called upon to resolve the debate. These cases fit into three general categories: (1) cases where the taxpayer claims the privilege when the papers are in his possession, but are owned by another;[31] (2) cases where the taxpayer claims the privilege when the papers are in the possession of his attorney or accountant;[32] and (3) cases where an attorney in possession of work papers claims the privilege in his client's behalf.[33] The federal courts have not agreed upon the extent to which the privilege is available in these instances and have given as many *ratio decidendi* for their holdings as there are cases.[34]

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[12] McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

[13] Hoffman v. United States, 341 U.S. 479, 486 (1951). The privilege does not extend to testimony that for some reason could do the witness no harm, as where prosecution for the crime about which testimony is given is barred by the statute of limitations. Brown v. Walker, 161 U.S. 591, 598 (1896).

[14] Rogers v. United States, 340 U.S. 367, 371 (1951), *rehearing denied,* 341 U.S. 912 (1951); United States v. White, 322 U.S. 694, 698-99 (1944).

[15] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[16] 58 AM. JUR. *Witnesses* § 36 (1948).

[17] Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

[18] Emspak v. United States, 349 U.S. 190, 194 (1955); Quinn v. United States, 349 U.S. 155, 162-63 (1955).

[19] Miranda v. Arizona, 384 U.S. 436 (1966). The courts have not settled the question of whether *Miranda* warnings are required at the beginning of an investigation for tax fraud, but, as a matter of policy, when the Internal Revenue Service transforms a routine civil audit into an investigation of possible criminal violations, the taxpayer will be informed of his rights. Lynch, *Miranda Warnings in Criminal Tax Investigations,* 49 TAXES 290 (1971); Comment, *Civil Versus Criminal: Taxpayers' Right Under the Fourth and Fifth Amendments,* 38 BROOKLYN L. REV. 130, 136 (1971).

[20] Rogers v. United States, 340 U.S. 367, 370-71 (1951), *rehearing denied,* 341 U.S. 912 (1951). A witness who has claimed the privilege may be compelled to give testimony without violating the purpose of the fifth amendment if he is granted use immunity. Kastigar v. United States, 406 U.S. 441 (1972). The privilege is made applicable to state proceedings by the operation of the 14th amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

[21] Boyd v. United States, 116 U.S. 616, 633 (1886).

[22] *Compare* Gouled v. United States, 255 U.S. 298 (1921), *with* Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), *noted in* 46 TUL. L. REV. 545 (1972).

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[23] Gouled v. United States, 225 U.S. 298 (1921) (documents siezed illegally); Ballman v. Fagin, 200 U.S. 186, 194-95 (1906) (dictum) (subpoena *duces tecum*); Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971) (valid search warrant).

[24] Rogers v. United States, 340 U.S. 367, 372 (1951), *rehearing denied,* 341 U.S. 912 (1951) (dictum) (documents were property of Communist Party); United States v. White, 322 U.S. 694 (1944) (documents were property of a Union); Wheeler v. United States, 226 U.S. 478 (1913) (documents were property of a corporation).

[25] United States v. White, 322 U.S. 694, 699 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

[26] Shapiro v. United States, 335 U.S. 1, 32-33 (1948); Wilson v. United States, 221 U.S. 361, 380 (1911); 58 AM. JUR. *Witnesses* § 73 (1948); Comment, *Books and Records and the Privilege Against Self-Incrimination,* 33 BROOKLYN L. REV. 70, 95-101 (1966). One writer expressed fear that the "required records exception" may ultimately be applied to an individual's tax records, which would deprive him of his privilege against self-incrimination. Weiss, *Self Incrimination and Income Tax Investigation,* 42 TAXES 706, 707 (1964).

[27] Comment, *Civil Versus Criminal: Taxpayer's Rights Under the Fourth and Fifth Amendments,* 38 BROOKLYN L. REV. 130, 136 (1971).

[28] *Id.*

[29] Ross, *What Every Lawyer Should Know About Tax Evasion and Fraud Cases,* 54 A.B.A.J. 1102 (1968). It is at this point that *Miranda* warnings are given *(See* note 19 *supra),* summonses are issued for the taxpayer's books and records *(See* INT. REV. CODE of 1954, § 7602) and debate ensues over whether the taxpayer may withhold the documents under a claim of privilege.

[30] Comment, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons,* 25 U. FLA. L. REV. 114, 127 (1972).

Possession and ownership play an important part in the determination of whether a taxpayer can claim the privilege against self-incrimination when summoned to produce work papers prepared by his accountant.[35] The general rule is that if the work papers are owned by the taxpayer, or if they are "in his indefinite and rightful possession," he may claim the privilege and refuse to produce them.[36] The Ninth Circuit Court of Appeals, in *United States v. Cohen*,[37] suggested a more liberal rule by holding that a taxpayer may refuse to produce incriminatory documents in his possession, even though the documents were created and owned by his accountant and he had demanded their return to comply with a summons.[38] A subsequent decision,[39] however, rejected *Cohen* and held that work papers are to be regarded as the property of the accountant unless it is shown that title has been transferred to the taxpayer. Thus, a taxpayer could not withhold documents owned by his accountant under a claim of privilege.[40]

To prevent his attorney or accountant from being compelled to produce incriminating documents, the taxpayer must intervene in the proceeding to enforce the summons[41] and assert his privilege against self-incrimination. Once the taxpayer is permitted to intervene, he is confronted with the strong language of *Couch v. United States*,[42] where it was held that actual possession and not ownership determines whether the privilege is available.[43] It was recognized, however, that instances may exist where the taxpayer is in constructive possession[44] of his tax records and may claim the privilege to prevent their production.[45] *Couch,* then, stands for the proposition that a taxpayer has little chance of successfully claiming the privilege against self-incrimination as to documents he has delivered to another unless he can establish constructive possession.

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[31] *E.g.*, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

[32] *E.g.*, Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

[33] *E.g.*, Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

[34] *See, e.g.*, Annot., 37 A.L.R.3d 1373 (1971).

[35] Garbis & Burke, *Fifth Amendment Protection of the Accountant's Workpapers in Tax Fraud Investigation*, 47 TAXES 12, 17-18 (1969).

[36] United States v. Fisher, 352 F. Supp. 731 (E.D. Penn. 1972) (dictum). The recent decision in Couch v. United States, 409 U.S. 322 (1973), has given this rule a future that is at best uncertain. The *Couch* Court noted that the decision in United States v. Cohen, 388 F.2d 464 (9th Cir. 1967), was "appropriate," but refused to state what set of facts will constitute "rightful possession." Couch v. United States, 409 U.S. 322, 330 n.12 (1973).

[37] 388 F.2d 464 (9th Cir. 1967).

[38] *Id.* at 468-69.

[39] United States v. Widelski, 452 F.2d 1 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

[40] *Id.* at 4-5. *Accord*, United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969), *noted in* 23 Sw. L.J. 728 (1969).

[41] Reisman v. Caplin, 375 U.S. 440 (1964). *Reisman* held that any third party or the taxpayer, if he is not already a party to the action, may intervene in the proceeding to enforce a section 7602 summons and protect his interests by challenging the summons on the ground that it was issued for the improper purpose of obtaining evidence to be used in the criminal prosecution of the taxpayer. *Id.* at 449. The Su-

Attorneys have advanced several theories to defeat summonses for their client's tax records,[46] but the one most frequently asserted and, in most cases, unequivocally rejected, is the attorney-client privilege.[47] The reason most often given for denying the claim is the pre-existing document rule. This rule states that the privilege does not attach to documents created by an accountant prior to their surrender to the attorney because they are not communications in confidence between

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preme Court subsequently clarified *Reisman* in Donaldson v. United States, 400 U.S. 517 (1971), *noted in* 32 MD. L. REV. 143 (1972). The Court in *Donaldson* dealt with FED. R. CIV. P. 24(a) (2), a rule allowing anyone interested in the property or transaction upon which the action is based to intervene and protect his rights. The Court held that such intervention is not guaranteed, but is only discretionary with the district court. 400 U.S. 517, 529-30. In addition, the Court held that a section 7602 summons is issued for a proper purpose if it is issued in good faith before there has been a recommendation for criminal prosecution. *Id.* at 536.

[42] 409 U.S. 322 (1973), *noted in* 3 MEMPHIS ST. U.L. REV. 383 (1973). *Accord,* Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964), *cert. denied,* 379 U.S. 967 (1965); United States v. Merrell, 303 F. Supp. 490 (N.D.N.Y. 1969).

[43] The court explained itself quite clearly:

> We hold today that no . . . Fifth Amendment claim can prevail where . . . there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.

409 U.S. at 336.

[44] The case, however, provided little guidance as to when this type of constructive possession exists. The Court cited Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956) (attorney stored his office files with a corporation); United States v. Guterma, 272 F.2d 344 (2d Cir. 1959) (taxpayer's records stored in a corporation's safe, to which only he knew the combination).

[45] 409 U.S. at 333-34.

[46] *E.g.,* United States v. Conte, 300 F. Supp. 73 (D. Del. 1969), where an attorney argued that if he were compelled to produce his client's tax records his own privilege against self-incrimination would be violated. By complying with the summons, he argued, he would be subjecting himself to a charge of breach of duty to his client before the state disciplinary committee. The court dismissed his argument. It was unlikely, the court said, that the committee would penalize him for obeying a lawful summons and a lawful court order. *Id.* at 75.

[47] *E.g.,* United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964), *cert. denied,* 377 U.S. 976 (1964); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), *cert. denied,* 346 U.S. 864 (1953).

attorney and client.[48] In many cases attorneys have joined a claim of their client's privilege against self-incrimination with an assertion of attorney-client privilege.[49] Such a claim, however, directly confronts earlier decisions holding that the fifth amendment privilege is personal to the witness and cannot be claimed for the benefit of another.[50] *United States v. Judson*[51] is one of the few decisions in which an attorney successfully claimed the privilege against self-incrimination for his client. There the Ninth Circuit Court of Appeals reasoned that since the records sought could not be compelled from the client, they could not be compelled from his attorney[52] because "[t]he attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry."[53]

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[48] United States v. White, 477 F.2d 757, 762 n.9 (5th Cir. 1973); Bouschor v. United States, 316 F.2d 451, 457 (8th Cir. 1963); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963); Lipton & Petrie, *Subpoena Powers of the Internal Revenue Service,* 37 WIS. B. BULL. 34, 43 (Dec. 1964); Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations,* 54 MINN. L. REV. 67, 84-86 (1969). The attorney-client privilege is available only where the communication is made by the client in a confidential manner to obtain legal advice from the attorney, or where an accountant has made a confidential communication concerning the client to aid the attorney in formulating a legal opinion. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Schmidt, 343 F. Supp. 444, 446 (M.D. Penn. 1972); United States v. Jacobs, 322 F. Supp. 1299 (C.D. Cal. 1971). The federal courts do not recognize an accountant-client privilege. Couch v. United States, 409 U.S. 322, 335 (1973); Sale v. United States, 228 F.2d 682 (8th Cir. 1956), *cert. denied,* 350 U.S. 1006 (1956).

[49] *E.g.,* United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

[50] *See* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); Zeigler v. United States, 174 F.2d 439, 447 (9th Cir. 1949), *cert. denied,* 338 U.S. 822 (1949); United States v. Baldridge, 281 F. Supp. 470 (S.D. Texas 1968), *vacated as moot,* 406 F.2d 526 (5th Cir. 1969). Recurrent in many decisions emphasizing the personal nature of the privilege are citations to United States v. White, 322 U.S. 694 (1944).

[51] 322 F.2d 460 (9th Cir. 1963). *Accord,* Brody v. United States, 243 F.2d 378 (1st Cir. 1957), *cert. denied,* 354 U.S. 923 (1957) (dictum); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

[52] 322 F.2d at 467-68. The court relied in part upon 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2307 (McNaughton rev. ed. 1961):

> [*W*]*hen the client himself would be privileged* from the production of the document, either as a party at common law or as a third person claiming title or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. . . . On the other hand, if the *client would be compellable* to produce, either by motion or subpoena or by bill of discovery, then the attorney is equally compellable, if the document is in his custody. . . .

322 F. 2d at 468. For a discussion of the implications of denying an attorney the right to claim the fifth amendment privilege for his client see Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination In Criminal Tax Investigations,* 21 U. MIAMI L. REV. 854 (1967).

[53] 322 F.2d at 467.

In the instant case, the court acknowledged that two opinions exist respecting whether an attorney may assert the privilege against self-incrimination in behalf of his client: the *United States v. White*[54] line of decisions holding that the privilege is personal to the witness; and the decisions subscribing to the view, articulated in *Judson,* that an attorney may claim the privilege in his client's behalf. The court stated, "without deciding," that if they were to hold with the latter decisions, an attorney would be able to invoke the privilege in his client's behalf only if his client would be protected by the privilege from the forced production of papers in his attorney's possession.[55] To determine when a taxpayer has standing to claim the privilege, the court analyzed *United States v. Couch*[56] and found that a taxpayer may assert the fifth amendment privilege only if he would be compelled to produce evidence against himself. The court interpreted *Couch* to hold that the fifth amendment is unavailable to a taxpayer who is not in actual or constructive possession of papers summoned by the government because the "essential ingredient of personal compulsion" is absent. The court concluded that the *Couch* concept of constructive possession would not allow a taxpayer to avail himself of the fifth amendment's protection where he has never been in possession of the summoned papers.

Circuit Judge Ainsworth, in dissent, wrote that the work papers would not have been compellable if they were in the taxpayers' possession because of the *Couch* Court's decision that possession, not ownership, determines whether the privilege is available.[57] Relying on Professor Wigmore's statement[58] and *Judson,* he urged that the fifth amendment and the nature of the attorney-client relationship operate to permit an attorney in possession of his client's documents to claim the privilege if his client would likewise be privileged if he possessed the summoned documents. A taxpayer, he maintained, is in constructive possession, as that term is defined in *Couch,* of work papers held by his attorney.

The court in the instant case relied heavily on *Couch,* a decision that radically altered prior law regarding the circumstances that will support a fifth amendment claim. Prior law was concerned with ownership; *Couch* dealt with possession. Proper analysis of the impact of the *Couch* decision on the present case suggests one question: Has *Couch,* as it is read by the instant court, changed the law in such a way that the result of this case would have been different if it were decided before *Couch?* To decide the case without the guidance of *Couch,* it must first be assumed, as the instant court did, that an attorney may, under the proper circumstances, claim the privilege in his client's behalf, and it must be supposed that the court would have applied the rule that an attorney may claim the privilege in his client's behalf if his client would likewise be privileged. Resort to pre-*Couch* law reveals that work papers are regarded as an accountant's property and that a taxpayer may not withhold documents owned by another under a claim of privilege.[59] Applying this rule, then, the attorney in the present case would not have had standing to invoke the privilege under prior law because the taxpayers, lacking title, would not have been privileged if they held the documents. If the foregoing analysis is correct, *Couch*, as it is interpreted by the instant court, has not changed the result in this case—it has only changed the reason why an attorney may not claim privilege in his client's behalf. That this court applied *Couch* properly, however, is not as easily concluded. After stating that an attorney probably has standing to invoke the privilege in his client's behalf, the instant court appears to suggest that an attorney may invoke the privilege only if his clients could successfully intervene in the proceeding to enforce the summons served on their attorney and claim the fifth amendment privilege to prevent him from complying with the summons. The court, then, has altered the rule that an attorney may claim the privilege for his clients if the privilege would be available to them *if they held the summoned documents. Couch* does not require such a change. *Couch* holds that standing to invoke the privilege is vested in the possessor or constructive possessor of the summoned documents. It follows that the court decided the instant case contrary to the commands of *Couch*.

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[54] 322 U.S. 694 (1944).

[55] The court noted that appellant might have argued that the work papers were within the attorney-client privilege. The court concluded, however, that such an argument would have been rejected because pre-existing documents are not confidential communications between attorney and client. *See* note 48 *supra.*

[56] 409 U.S. 322 (1973).

[57] *See* note 36 *supra.*

[58] 8 J. Wigmore, *supra* note 52.

Prior to the instant court's interpretation of *Couch*, the authors of one article[60] suggested that the observance of certain precautions[61] would protect a client's financial records, in the hands of his attorney, from governmental constraint. Applying the guidelines announced in the present case, it is not certain that punctilious observance of these precautions would enable an attorney to resist production of documents in his possession by claiming the fifth amendment privilege for his client. Though the court does imply that ownership of the documents by the taxpayer is one element necessary to confer standing on his attorney — an implication contrary to the edict in *Couch* — it goes further and suggests that there must be some ritualistic transfer of the records from the taxpayer to his attorney to establish the privilege. Such a requirement offends the fifth amendment; allowing the privilege to be invoked only if ritual is rigidly followed is not co-extensive with the policy that the privilege against self-incrimination is to be liberally construed and applied. The privilege requires that an attorney, a representative believed by many to be his client's alter ego,[62] be privileged to resist the compelled production of his client's documents. It is not submitted that the courts permit an errant taxpayer to secrete papers evincing his failure to properly report his financial condition by simply handing them to his attorney. It is necessary, however, that a taxpayer be able to give his documents to his attorney, or request that his accountant surrender his papers to his attorney, for purposes of obtaining legal representation without forfeiting his cherished privilege. The dissenter in the instant case suggested the proper result when he wrote that the attorney had standing to invoke the privilege because his clients were in constructive possession of the work papers held by him.

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[59] *See* notes 39 & 40 *supra*.

[60] Hochman & Salkin, *Attorney-Client Privilege in Criminal Tax Cases*, 43 TAXES 182 (1965).

[61] The suggestions were: that the attorney hire an accountant to work on his client's case by written agreement; that the attorney and the accountant enter into an agreement whereby the attorney has title to all of the accountant's work papers; that a contract be drafted stating that the accountant will not testify about the client's financial matters without taking a final appeal; that title to all documents existing before the attorney-client relationship be transferred to the client; and that, as much as possible, the documents be left in the client's possession. *Id.* at 188.

Should the Supreme Court decide a case as the dissenter urges, all will not be lost for the Internal Revenue Service. The Supreme Court may include in its opinion a recommendation that Congress enable the Service to grant immunity to taxpayers who can successfully resist production of their tax records on fifth amendment grounds, or in any other case where the Service is interested in obtaining a taxpayer's records to assess his civil tax liability without engaging in a long and costly legal battle through the appellate courts. The Supreme Court has made a similar recommendation in the past[63] and an immunity statute exists[64] that might be used by the Internal Revenue Service to grant immunity with only slight modification of the Internal Revenue Code.[65] The statute is constitutional and grants the witness only immunity from use of the evidence given against him in a criminal proceeding.[66] If this statute were used in internal revenue proceedings, the Service would be barred only from using the documentary evidence obtained to prosecute the taxpayer for a criminal violation of the tax laws; the Service would not be prohibited from collecting any civil tax liability or civil penalty. The effect of application of the statute to internal revenue proceedings would be to broaden the possibilities of effective tax regulation and enforcement. The Service would be assured that in any case it could collect the tax and penalties due; a taxpayer who is able to resist production of his documents could no longer escape his tax liability altogether. The Service would, in addition, have the option of proving in court that the witness is not entitled to the privilege or granting the recalcitrant taxpayer immunity and collecting lawful tax arrearages and penalties.

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[62] *See, e.g.,* United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

[63] McCarthy v. Arndstein, 266 U.S. 34 (1924). The court stated:

> [A bankrupt] comes, like any other person, merely to testify. In that connection he may, like any other witness, assert the Constitutional privilege; because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witness is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. . . .

Id. at 42.

[64] 18 U.S.C. § 6002 (1970). Section 6002 provides in part that whenever a witness refuses to testify or produce other information on fifth amendment grounds in a proceeding before a court or agency of the United States and the person presiding over the proceeding orders the witness to answer or produce, the witness may not refuse to comply on fifth amendment grounds; but the testimony or information so obtained may not be used against the witness in any criminal case. He may, however, be prosecuted for perjury, giving a false statement, or failing to comply with the order.

[65] *See* INT. REV. CODE OF 1954, §§ 7122, 7206.

[66] Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey State Comm'n. of Investigation, 406 U.S. 472 (1972).

Thomas C. Gerity

BOOK REVIEW

OIL AND GAS FEDERAL INCOME TAXATION

Kenneth G. Miller, editor. Commerce Clearing House, Inc.
Chicago, Illinois. 1973 Edition. Pp. 519. $15.00.

Martha W. Gerald and David B. Herrimann, Jr.**

The editor of this work has endeavored to offer in one small and economical package a readable and in-depth treatment of those concepts of the federal income tax law which are particularly applicable to the oil and gas industry. His success in this undertaking is evidenced by the fact that the book is now in its eleventh edition, having first been published in 1948, and republished on a yearly basis since 1966.

The book is structured in a manner that allows it to serve not only as a ready reference for the experienced practitioner, but also as a highly satisfactory introductory text. It begins by concisely defining the most significant single feature of his field of tax law, the depletion allowance, and devotes the major portion of its first 10 chapters to a thorough examination of this and related matters. Another substantial portion probes in detail tax consequences relating to the ownership of various types of property interests in oil and gas in place, royalties, production payments, working interests and the like. Later chapters deal with subjects unique to the oil and gas industry — delay rentals, unitizations, and intangible drilling and development costs. More generally applicable areas of the tax law, such as corporate reorganizations and depreciation, are also treated. Coverage in these instances is limited to a discussion of matters of some particular significance to the oil and gas industry.

The considerable value of this work lies first in its extensive treatment of the subject matter and second in its clarity and simplicity of style. Authorities are cited to support all points made and, to bring the text more perfectly into focus, one or more "illustrative examples" are included in the majority of the thirty chapters. The book, which incidentally has some application to mineral interests other than oil and gas, was offered to the public in March, and is to be kept current for the year, at no extra charge to the buyer, by the issuance of June, September and December supplements. Future editions hopefully will be handled in the same manner.

Although the federal income taxation of oil and gas transactions is a specialized area of the tax law, it must be considered in all oil and gas transactions. It is a complex and evolving field, practice in which necessitates the use of concise and current references. This book, in conjunction with its supplements and successor editions, will readily fulfill the requirements of both practitioner and student, and will do so at a total price which is clearly nothing less than a bargain.

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P. O. Box 786
John W. Crisler
Box 1116
Chester Harris Curtis
Bank of Clarksdale
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152 Delta Avenue
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P. O. Box 127
Ollie L. Garmon, III
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Joseph Cobb Gibbs
152 Delta Avenue
L. Alex Gilliam, Jr.
Box 100
Marshall Lee Graves, Jr.
Box 865
Wayne S. Harris
P. O. Box 966
Pascal D. Holcomb
152 Delta Avenue
Joseph W. Hopkins
Stevens Building
David R. Hunt
123 Court Street
Michael L. Kemp
Apt. 105 125 W 2nd
Street
Linda Bon Lipe
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William H. Maynard
P. O. Drawer 488
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Box 787
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Thomas H. Pearson
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Box 431
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Tom T. Ross
Box 339
Lester M. Sack
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James Allen Sadler
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Charles L. Sullivan
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Horace Hunter Twiford, III
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449 Andrews
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900 Maple Street
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Stephen W. Blackburn
207 North Street
Ancil L. Cox, Jr.
Box 608
Joseph C. Feduccia
112 N. Pearman Avenue
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John L. Hatcher
P. O. Box 159
John A. Hatcher, Jr.
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Joseph M. Howorth
Box 627
Lucy S. Howorth
Box 627
Gerald H. Jacks
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Robert G. Johnston
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Alfred A. Levingston
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C. Arthur McIntosh
P. O. Box 159
Laurence Y. Mellen
P. O. Box 159
Ben F. Mitchel
County Judge
Donald L. Moak
Delta State College
Dana C. Moore, Jr.
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William E. O'Hare
P. O. Box 630
W. Allen Pepper, Jr.
105 South Court Street
A. B. Sparkman
121 N. Bayou Avenue
James Irving Tims
Box 1173
Carmon E. Valentine
205 South Court Street
John White Valentine
205 South Court Street
James H. Walker
Box 966
Arthur C. Whittemore
609 John Drive
Frank O. Wynne, Jr.
Commerce Building

CLINTON

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1212 Rockingham
Jack C. Boyles
137 Murial Drive
Edwin K. Clayton
1004 Briarwood Drive
Tom Coward, Jr.
1204 Pineview Drive
Herbert D. Farrell
1002 Laurewood Drive
N. Shelton Hand, Jr.
Mississippi College
William H. Hewitt
800 East Leake Street
John L. Kennedy
1210 Manchester
Ewell McDonald, Jr.
Box 264
C. G. Muse, Jr.
541 Belle Vue Street
Percy Howard Parkman
Box 224
William R. Phillips
101 Sunset Drive
John H. Rogers
1007 Tanglewood Drive

George B. Taylor
716 Bellvue Street
W. A. Thornton
1612 Tanglewood Drive
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101 Mount Salus Apt. 305
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Box 240

COLLINS

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Box 647
William W. Allred
P. O. Box 521
Kenneth Earl Crawford
Box 837
W. W. Dent
John K. Keyes
Box 546
Dan A. McIntosh, III
Box 554
Tommy Bott Rogers
Box 752
Bonnie Smith
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COLUMBIA

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203 Newsom Building
Bernard Callender
310-312 Newsom Building
William C. Callender
P. O. Box 604
Alvin O. Chambliss, Jr.
1107 Maxwell Street
Lee K. Conner
East Second Street
Raymond Mize Conner
Box 403
Fred Lavern Cooper
209 Newsom Building
Sebe Dale
P. O. Box 603
James Seaborn Dale, Jr.
Watts Building
Box 603
Maurice Dantin
310 Newsom Building
James R. Davis
Box 222
Ernest R. Duff
216 Newsom Building
Richard D. Foxworth
216 Newsom Building
Toxey Hall
310-312 Newsom Building
Thomas D. McNeese
216 Newsom Building
Emory E. Morgan
335 Second Street
Uhl Poole Fernea Patterson
Box 216
Henry E. Pope
Box 165
Ben Mounger Rawls
P. O. Drawer 232
Philip Singley
335 Second Street
Box 9
Garland D. Upton
P. O. Box 46

COLUMBUS

William Ellis Bearden
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William G. Burgin, Jr.
Box 32
Dudley H. Carter
Box 981
Richard Chotard, Jr.
2106 Bluecut
James Albert Dale, III
519 2nd Avenue North
Akbar Deededar
519 2nd Avenue North
Chester Davis Gaston
Route 5 Box 7
Gary L. Geeslin
P. O. Box 1366
Hunter M. Gholson
516 North 2nd Avenue
James Tyson Graham
Box 166
Thomas Clower Harvey, Jr.
Box 602
Dewitt T. Hicks, Jr.
P. O. Box 1094
John H. Holloman
Box 1102
Robert H. Jackson
429 Springdale
W. Welborn Johnson
Box 166
W. H. Jolly
P. O. Box 743
Willis H. Jolly, Jr.
Box 743
Billy J. Jordan
Box 295
James C. Mauldin
Mauldin Furniture
Hal H. H. McClanahan, III
Aubrey Eugene Nichols
518 Second Avenue North
Ben L. Owen
Box 1001
Jacob C. Pongetti
126 5th Street North
Lenore L. Prather
Box 903
Robert Brooks Prather
Box 32
Ralph Edward Rood
Box 32
J. O. Sams
514 2nd Avenue North
J. O. Sams, Jr.
P. O. Box 249
David Lawrence Sanders
Box 1366
George J. Schweizer
Box 1017
John F. S. Sims
P. O. Box 648
Taylor B. Smith
P. O. Box 1094
Douglas C. Stone
P. O. Box 166
Robert Clark Stovall, Jr.
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James A. Walters
519 North 2nd Avenue
Richard L. Watson
116 Gardenia Street
Robin Weaver
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COMO

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Drawer B.
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James P. Dean
P. O. Drawer B
Luther M. Dove, Jr.
P. O. Drawer 1519
Donald Ray Downs
P. O. Box 191
Jimmy Blaine Fisher
Box 844
John Hughes Henderson, Jr.
Box 686
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1802 Maple Road
John L. Hopkins
Box 801
H. A. Hopper
Chambers Lidden Bldg.
Robert G. Krohn
P. O. Box 549
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Joe B. Mitchell
Box 533
James E. Price, Jr.
Box 549
John Curlee Ross, Jr.
Box 191
William L. Sharp
Box 844
Rodney F. Simmons
Drawer 311
Judge Orma R. Smith
U.S. District Court
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W. C. Sweat, Jr.
P. O. Box 128
Charles R. Wilbanks
P. O. Box 801
John Ronald Windsor
Drawer B
B. F. Worsham
Box 146
John Richard Young
Box 212

CRYSTAL SPRINGS

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Box 287
James Warren Kitchens
Box 367
Merrimen M. Watkins
P. O. Box 233

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Leo Horan
P. O. Box 367
William H. Johnson, Jr.
P. O. Box 55
Leon Mangum
Box 222

DEKALB

J. H. Daws
Helen J. McDade
P. O. Box 112
James David Spinks
Box 26

DREW

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401 Gertrude
O. M. Marsalis
Thomas M. McWilliams
111 S. Main Street
Pascol J. Townsend, Jr.
111 S. Main Street

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Calvin R. King
Drawer 392
S. R. King
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James A. White
P. O. Box 283

EDWARDS

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Box 375
Bobby Leon McHann
P. O. Box 96

ELLISVILLE

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W. D. Carmichael
P. O. Box 250
Glender Dennis
P. O. Box 426
Freida Sharon Gunn
205 Deason Street
Billy Joe Landrum
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Box 450
William T. Denman, III
Drawer G
Charles Pete Fortner, Jr.
Drawer F
W. Buchanan Meek
Edwin Arnold Snyder
Box 134

FALKNER

Joe Thomas Gay

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R. L. Corban, Jr.
Carroll J. McLaurin

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FLORENCE

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Box 345
Billie Juhan
Box 371

FLORA

J. Frank Evans
Box 364

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William A. Huff
P. O. Box 179
Dannye L. Hunter
Box 336
Osborn G. Idom
P. O. Box 336
James Walter Lee
Box 385
Roy Noble Lee
P. O. Box 370
Thomas Drayton Lee
Box 370
Tom Stewart Lee
P. O. Box 16
Howard B. McCrory, Jr.
P. O. Box 46
Constance I. Slaughter
Box 334
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FULTON

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William Herman Camp
Euple Dozier
P. O. Box 284
Percy A. Martin
P. O. Box 491
Nell C. May
P. O. Box 538
Frank A. Russell
Box 525
Stacy B. Russell
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GLOSTER

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Walker J. Carney, Jr.
P. O. Box 99
J. T. Lowrey
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GREENVILLE

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Nathan P. Adams, Jr.
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Jesse Murray Akers
Drawer 99
John E. Ashcraft, Jr.
447 Arnold
Edward J. Bogen
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Eugene M. Bogen
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P. O. Box 40
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Box 1334
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Leyser Building
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Howard Dyer, III
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Box 452
Holland O. Felts
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Edwin S. Gault
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Don Oliver Gleason
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L. Carl Hagwood
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Philip Mansour
Box 773
W. M. McGough
P. O. Box 660
W. L. McIlwain
P. O. Box 558
Willard Lee McIlwain
Box 558
William E. McLellan
Box 342
Eugene L. McLemore
Box 575
Horace L. Merideth, Jr.
P. O. Drawer 99
H. A. Miller
Box 1334
Randolph Noble, Jr.
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S. Ira Pittman
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Judge Zelma W. Price
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Earl S. Solomon, Jr.
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Clayton J. Swank, III
217 Bermuda Drive
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Box 216
Austin L. Taylor, Jr.
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Frank S. Thackston, Jr.
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S. B. Thomas
P. O. Box 395
William Thomas, Jr.
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222 W. Yerger Street
Charles S. Tindall
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Charles Sumner Tindall, III
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Lawrence Douglas Wade
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Clell G. Ward
Box 575
James Marvin Ward
125 Sherwood Drive
Rodger Downing Wasson
Box 1205
J. Wesley Watkins, III
Box 504
Taylor Webb
313 South Washington
Burwell B. Wilkes
Circuit Judge
Joseph E. Wroten
Box 812
Douglas C. Wynn
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GREENWOOD

Edward J. Antoon
Box 417
Willie Lee Bailey
Box 1909
Billy Burton Bowman
Box 518
Norman C. Brewer
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P. O. Box 941
James W. Burgoon, Jr.
P. O. Box 391
Robert Murray Carpenter
115 Howard Street
Travis H. Clark, Jr.
P. O. Drawer B
Joseph G. Colson
Box 364
James Yeager Dale
Drawer 1180
Charles Milton Deaton
Drawer B
Gray Evans
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George A. Everett
P. O. Box 253
John J. Fraiser, Jr.
P. O. Box 391
William W. Franklin
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Andrew Marlowe Gambrell
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O. L. Kimbrough
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Hardy Lott
P. O. Box 1176
R. Cunliffe McBee
Drawer 657
George Hite McLean
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Pearl McLellan
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Floyd M. Melton, Jr.
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Yerger Morehead
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Whitman D. Mounger
122 Riverside
Frank K. Odom
P. O. Box 674
H. Talbot Odom
Drawer 1218
Porter W. Peteet
Box 263
James M. Pierce
P. O. Box 178
Judge Charles Pollard
P. O. Box 393
William H. Roberson
P. O. Box 263
Luke J. Schissel
Drawer 1439
Gordon L. Smith
804 Bell Avenue
Richard L. Smith
Drawer 1139
Waldo Sterling Stuckey, Jr.
Drawer 1439

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Box 844
Seth Wheatley, Jr.
Box 1056
Charles Leroy Whitam
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W. M. Whittington, Jr.
P. O. Box 941
Fred Witty
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James E. Upshaw
Drawer 1180

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Joseph Patrick Compretta
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Everette E. Cook
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Bruce G. Cornell
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Drawer W
James S. Eaton
P. O. Drawer H
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Henderson C. Lindsey
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Box 1769
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Stanford E. Morse, Jr.
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Sherman L. Muths, Jr.
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Albert Necaise
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Paul M. Newton
2414 Fourteenth Street
Robert S. Newton
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Neil W. White, Jr.
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GUNTOWN

James W. Bingham
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P. O. Box 750
Dorrance Aultman
P. O. Box 750
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Stone D. Barefield
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Box 623
L. R. Floyd
RFD 2 Box 122
Willis T. Matthews
103 Bankers Trust Building
George Donald Runnels
113 NW First Street

MAGNOLIA

Judge Thad Leggett, III
County Court Pike County
P. O. Box 307
O. W. Phillips
225 East Bay Street
William Benjamin Regan
225 East Bay Street
B. D. Statham
110 North Cherry Street
William F. Watkins
101 North Cherry Street

MARKS

Ben M. Caldwell
P. O. Box 370
Partee L. Denton
331 Locust Street
Ellen E. Goldman
231 Chestnut
Ney M. Gore, Jr.
337 First Street
T. N. Gore
T. N. Gore, Jr.
301 Locust Street
Mose E. Kincaid
805 Third
Lomax Lamb, Jr.
Larry O'Keefe Lewis
Box 370
Eugene Thompson
P. O. Box 66

MATHISTON

Will P. Starnes
P. O. Box 33

McCOMB

Louis Alford
P. O. Box 489
Clinton Ashley Atkinson
P. O. Box 155
Robert W. Brumfield
P. O. Box 886
Charles Wayne Dowdy
Box 853
John B. Ewing
P. O. Box 428
Norman B. Gillis, Jr.
P. O. Drawer G
William S. Guy
Morgan & Lindsay Building
P. O. Box 853
Judge Bert H. Jones
Chancellor
L. S. McClaren
324 New York Avenue
Gerald M. McMillan
P. O. Box 73
George Terrell Morgan
Box 998
Joe N. Pigott
Drawer P
Clyde Ratcliff
Box 81
R. B. Reeves
212 3rd Street
Robert S. Reeves
212 Third Street
J. Gordon Roach
Box 967
John Gordon Roach, Jr.
P. O. Box 506
Hansford L. Simmons
509 Caston
Drennen Michael Smith
P. O. Box 592
Wayne L. Sterling
Box 592
Thomas H. Walman
Drawer 527
Laverne A. Varnado
P. O. Box 959
John H. White, Jr.
P. O. Box 672
William A. Wiltshire
P. O. Drawer 527

MEADVILLE

L. L. Forman
K. Maxwell Graves, Jr.
P. O. Box 361
W. Wilson Hewitt
M. Bradley Lawrence
Nolan M. McCoy
Box 265
H. B. Mayes McGehee
P. O. Box 188
Judge James A. Torrey
Circuit Court
James A. Torrey, Jr.
P. O. Box 188
Sanfred P. Torrey
P. O. Box 227

MENDENHALL

Thomas B. Alexander
Ras Milton Boyles
P. O. Box 576
Travis Hilton Bryant
122 Court Street
Grover C. Coleman
P. O. Box 402
A. K. Edwards
Box 66
Judge George B. Grubbs
Box 217
Isom C. Harrington
P. O. Box 181
Douglas M. Magee
Box 155
Aleita M. Sullivan
Box 575
Thomas H. Sullivan, Jr.
Box 37
J. W. Walker
Chancery Judge
Connie S. Whitfield
127 South Main Street
George G. Williamson
Box 687

MERIDIAN

J. P. Abston
208 Lamar Building
Gerald Adams
Box 849
George W. Allen
Box 367
Brad B. Bailey
2314-17th Street
Robert Walter Bailey
509-21st Avenue
L. D. Beard
207-09 Lamar Building
Thomas D. Bourdeaux
Box 2009
Maxie Gene Brown
P. O. Box 305
Frank J. Buchanan
4257 Poplar Springs Drive

F. Gerald Burnett
324 Citizens National Bank Building
Joe G. Byrd
2810-7th Street
Apt. 8
Overton W. Cameron
Box 888
Robert D. Coit
P. O. Box 424
William Bond Compton
Box 845
Alfred E. Corey
P. O. Box 1413
Lyle V. Corey
Box 1413
J. Michael Corrigan, Jr.
413 Greater Mississippi Life
Billy R. Covington
P. O. Box 1904
J. A. Covington
P. O. Box 786
Dal M. Crenshaw
2nd Floor
Meridan Building & Loan Building
Robert H. Crook
1803-24th Avenue
Robert B. Deen, Jr.
Box 888
Aubert C. Dunn
P. O. Box 1745
Edwin A. Dunn
P. O. Box 1745
Cecil S. Edmundson, Jr.
P. O. Box 3125
Walter W. Eppes, Jr.
2nd Floor
Meridan Building & Loan Building
G. Payner Gaillard
1000 20th Avenue
Champ C. Gipson
Box 804
Wingfield Glover, Jr.
P. O. Box 1389
C. Dennis Goldman
Box 1625
Thomas L. Goldman
Box 1625
Hardy P. Graham
2000 Country Club Drive
William J. Gunn, Jr.
2nd Floor
Meridian Building & Loan Building
Maurice Hinton Hall, Jr.
Box 1627
Joe Clay Hamilton
Box 5376
Robert Wallace Hamill
Box 5376
William Clanton Hammack
Box 2009
John M. Harmon
P. O. Box 1443
James Emerson Harwell, Jr.
726 6th Avenue
Thomas M. Hendricks, Jr.
P. O. Box 1501
Thomas C. Hogan
402-25th Avenue
Thomas K. Holyfield
325 Lamar Building
Box 1928
Harry L. Hopkins
Route 8 Box 62-A
Philip D. Hughes
Box 1468
Alvis C. Johnson
Box 824
Granville Jones
Box 1562
Harris W. Sonny Jones, Jr.
Box 725
S. B. T. Jones
Box 5028
Thomas R. Jones, Jr.
P. O. Box 2009
Earl P. Jordan, Jr.
Stratford Manor Apt. C-15
4640 Poplar Springs Drive
Maurice F. Kahlmus
Box 5658
Dempsey G. Knight, Jr.
c/o Queen City Nursing Center
1201 28th Avenue
Irvin L. Martin, Jr.
Box 202
Jerry Gordon Mason
Citizens National Bank Building
Suite 426
Thomas Y. Minniece
Box 5376
Stephen Owen Moore
Trust Department
Merchant & Farmers Bank
S. R. Nettles
903-31st Avenue
Paul Mains Neville
Box 5376
Judge William Deb Neville
Chancellor
P. O. Box 908
Harold Noe
Box 2009
Joe R. Odom
P. O. Box 607
Henry Welch Palmer
2205-39th Avenue
Howard R. Pigford
P. O. Box 1501
Claude L. Pitts
300 Rosenbaum Building
James Nicholas Potuk
3409 35th Avenue
John Leslie Prichard
P. O. Box 888
Thomas Jefferson Prince, Jr.
Trust Department
Citizens National Bank
Lawrence W. Rabb
907 Greater Mississippi Life Building
Harvey Blanton Ray
Box 5633
William E. Ready
P. O. Box 927
Fred M. Rogers
1823-34th Street
Margaret E. Rogers
2612-19th Street
James Edgar Sandusky
Box 1754

Daniel P. Self, Jr.
Box 949
John Rex Shannon
Route 6 Box 131
C. D. Shields
P. O. Box 367
James T. Singley
P. O. Box 5376
E. L. Snow
Box 786
James T. Speed
Box 5355
Kenneth L. Swarthout, Jr.
Box 844
W. Arlo Temple
Snow, Covington & Watts
Box 786
Robert L. Tinsley, Jr.
Box 1327
Thomas R. Ward
P. O. Box 3007
George D. Warner, Jr.
Box 5633
Judge Homer C. Watkins
Box 1952
Thomas K. Watts
Box 786
Q. Earl Webb
411 Greater Mississippi Life Building
J. C. Wilbourn
Box 1389
Richard E. Wilbourn, II
P. O. Box 1389
J. Pat Wiley
Box 504
James A. Williams
P. O. Box 5183
James D. Williams
Box 1389
Marvin Williams
2nd Floor
Meridian Building & Loan Building
Donald W. Williamson
Box 425
N. S. Williamson
Box 86
James E. Williamson, Jr.
P. O. Box 804
Judge Lester F. Williamson
Circuit Court 10th District
P. O. Box 1501
Gibson B. Witherspoon
Box 845
Henry S. Woodall
Box 11
Ralph E. Young
P. O. Box 888

MINTER CITY

Richard C. McBee, III
Equen Planting Company

MONTICELLO

James Shelby George
Jack A. Morris
P. O. Drawer C
Robert Glenn Turnage
Box 325
Francis M. Vining
Box 250

MOORHEAD

Ben Himelstein

MORTON

James Thomas Farris
Drawer K

MOSS POINT

Charles B. Bratt
P. O. Box 461
Louis Fondren
617 Main Street
Frank J. Hammond, Jr.
Box 356
Robert T. Mills
P. O. Box 706
Richard E. Perkins, Jr.
Box 706

MOUND BAYOU

Catherine Patterson Mitchell
Drawer H

MT. OLIVE

Atticus A. Calhoun
Box 297

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William G. Collins
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NATCHEZ

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Basil G. Ballard
P. O. Box 1443
Edwin E. Benoist, Jr.
P. O. Box 913
Frederick C. Berger
P. O. Box 1144
Judge Robert A. Bonds, Jr.
508 Main Street
David C. Bramlette
P. O. Box 1307
James M. Brandon
P. O. Box 1344
J. Walter Brown, Jr.
114 South Wall Street
Richard A. Campbell, Jr.
Route 5
B. C. Callon
P. O. Box 640
Walter D. Coleman
31 Orange Avenue
Judge Curtis L. Collins
Chancellor 17th District
Clinton A. Davis
21 New Street
E. H. Fitzpatrick, Jr.
Box 226
Brent Forman
Box 1307
W. W. Geisenberger
Drawer 344
John T. Green
110 South Wall Street
Thomas K. Green, Jr.
123 South Commerce Street
Lucien G. Gwin
Box 1384
Lucien C. Gwin, Jr.
Box 375
G. Stuart Handy
P. O. Drawer 1344
Graham H. Hicks
Box 364

Oliver M. Hornsby
P. O. Drawer 1021
Eunice V. Johnson
P. O. Box 1322
Forrest A. Johnson
P. O. Box 1322
James H. Keyer
Ground Floor Front
Lomond Building
Robert D. Lee
133 South Commerce
Anabel Y. Maxie
1016 Main Street
Thomas M. McNeely, Jr.
116 South Wall Street
Herman Bradford Miller, Jr.
8 Beechwood Lane
John E. Mulhean, Jr.
202 South Wall Street
Clyde W. Mullins
133 South Cinnerce Street
Robert L. Netterville
Box 946
Daniel J. O'Beirne
P. O. Drawer 1344
Thomas J. O'Beirne
Box 330
C. F. Patterson
506 South Union Street
Claude Pintard, Jr.
114 South Wall Street
Jack E. Pool
202 South Wall Street
William F. Riley
114 South Wall Street
Harry L. Rosenthal
Box 891
J. Fred Schmidt, Jr.
304 Auburn Avenue
S. Barnett Serio, Jr.
Box 1207
Cecil Gill Smith, Jr.
133 South Commerce Street
William Marion Smith
Box 1307
John Merritt Tipton
220 Main Street
E. G. Truly
Box 1307
Frank W. Walden
Box 345
Edwin C. Ward
Box 1307
Calvin B. Wells
220 Main Street
George Ferdinand West, Jr.
Box 1202
Robert Y. Wood, Jr.
114 South Wall Street
Clarence N. Young
Box 1407
Leonard Albert Young
55 Seargent Prentiss Drive
Joseph S. Zuccaro
114 South Wall Street

NESBIT

Lee Virden Hamberlin
Route 1 Box 505

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Hugh N. Clayton
Box 157
Tom Leslie Darden
Henry H. King
Box 184
Baxter N. Knox, Jr.
P. O. Box 336
Talmadge D. Littlejohn
Houston Building
Box 869
W. Lester McDonough
P. O. Box 186
John David Pennebaker
Box 96
William O. Rutledge, III
Route 4
Edgar J. Stephens, Jr.
P. O. Box 330
Lester F. Sumners
P. O. Box 123
Joseph T. Wilkins, III
Box 973

NEW AUGUSTA

John M. Dunnam, Jr.
Box 138

NEWTON

D. M. Anderson
Box 7
Jack W. Brand
Box 380
W. A. Byrd
102 Byrd Street
R. S. Majure
Box 220
George S. Monroe
Box 28
Edmund J. Phillips, Jr.
Box 178
S. T. Roebuck
104 North Main Street

NORTH BILOXI

Leman Gandy
231 Central Avenue
Paul R. Tarbutton
15909 Langley Drive

NORTH CARROLLTON

W. C. Neill
Peoples Bank & Trust Co.

OCEAN SPRINGS

B. O. Bailey, Jr.
Box 552
John Richard Blossman
206 Shearwater Drive
Lynden Bowring
207 Pershing Avenue
Judge L. C. Corban
P. O. Box 547
Phil R. Dunnaway
Box 564
Stephen L. Guice
1012 Government Street
A. Y. Harper
P. O. Box 712
John L. Heiss, Jr.
Box 221
Ransom P. Jones
RFD 3 Box 159
Oscar R. Jordan
914 Washington Avenue
George R. Lewis
Box 895
Russell Moran
P. O. Drawer AA

Schuyler Poitevent, Jr.
James Russell Reed, Jr.
P. O. Box 836
S. B. Watkins
Route 4 Box 186-F
James Webster Wilson
1 Bay Sweep Circle

OKOLONA

Kenneth M. Burns
Box 309
Robert K. Coleman
Box 309
H. L. Morrison
Walter M. O'Barr
P. O. Box 309
John D. Sibley
Main Street

OLIVE BRANCH

James Ward Amos
7155 Highway 78
Drue Birmingham, Jr.

OVETT

John H. Shows
Route 1

OXFORD

Vettra Glen Alderson
P. O. Box 345
Lloyd A. Bailey
Phoenix Apt. 11
Gordon Edward Baird
313 Van Buren
Russell Blair
204 1st National
Bank Building
100 North Lamar
William Francis
Bullock, Jr.
313 Washington Avenue
Extended
William M. Champion
306 McLaurin
Gerald H. Center
1013 Jackson Avenue
Robin O. Cotten
626 Park Drive
O'Mar Dell Craig
Box 163
William Peyton Dodson
P. O. Box 525
Angelo J. Dorizas
204 1st National
Bank Building
100 North Lamar
William M. Dye, Jr.
304 Murry Street
James Oliver Ford
North Mississippi Rural
Legal Service
William Roy Ford
Route 1
Thomas H. Freeland, III
Box 269
Gerald A. Gafford
P. O. Box 269
Norman Gillespie
Assistant U.S. Attorney
Northern District
Lowell E. Grisham
P. O. Box 566
Will A. Hickman
P. O. Box 430
Jere Richmond Hoar
Route 1
William Hooper, Jr.
Box 566
Charles D. Hoseman
235 Avent Apts.
T. Marx Huff
Box 190
Clyde Gray Huggins, Jr.
Box 8
William Walker Joor
Box 207
William P. Joyner
Lee Loop
Sam D. Knowlton
Old Taylor Road
Henry L. Lackey
Box 269
William R. Lamb
P. O. Box 349
Alfred Eugene Lee
406 Thomas Street
William Lewis, Jr.
Box 31
David M. Lipman
108½ South Lamar
Anna Maddan
719 University Ave. #12
Falton O. Mason, Jr.
819 Filmore
Thomas Richard Mayfield
108½ South Lamar
Robert E. Jack McCormick
426 South Lamar
Taylor H. McElroy
P. O. Box 269
A. E. Moreton
110 Vivian Street
Nick A. Mavar, Jr.
209 Cullen Road
Casey Culpeper Pace
619 University Avenue
Fred Barringer Patton
518 Tyler Avenue
F. Edwin Perry
P. O. Box 345
J. W. Price
307 South Lamar
Samuel Thomas Rayburn
Box 430
H. M. Ray
Box 191
Basil W. Richmond, Jr.
1113 Jackson Avenue
Bramlett Roberts
Box 507
Alix Henry Sanders
108½ North Lamar
William Troy Sloan
P. O. Box 163
Francis B. Stevens
Acting Director,
N.M.R.L.S.
108½ South Lamar St.
Louise Lawrence Terrell
1012 South Lamar
Charles Harrison Walker
Box 507
Philip Scott Weinberg
Box 345
R. X. Williams
Lyric Theatre Bldg.
1008-1010 Van Buren

PASCAGOULA

Larry D. Allen
Box 1692

James W. Backstrom
  1103 Jackson Avenue
Emily V. Baker
  Box 1692
Glenn Barlow
  P. O. Box 1241
W. E. Belt
  P. O. Box 666
Vincent Blackwell
  P. O. Box H
Raymond L. Brown
  P. O. Box 787
John F. Bryan, III
  Drawer 1529
Charles Gray Burdick
  Box 787
French Caldwell
  P. O. Box 149
Joe R. Colingo
  P. O. Box H
James H. Colmer
  P. O. Box 787
John Gordon Corelew
  Box 787
Dan Castello
  P. O. Box 2248
Arvis Cumbest
  P. O. Drawer 1287
Donald W. Cumbest
  P. O. Drawer 1287
Ronnie Donald Cumbest
  Box 1287
Gerald A. Dickerson
  1103 Jackson Avenue
William B. Dorsey
  706 Watts Avenue
Guy C. Faggard
  Box 714
Alfred Lee Felder
  Box 1087
Charles W. Ford
  P. O. Box 100
Lester C. Franklin, Jr.
  P. O. Box 1056
E. M. Galloway
  Box 658
H. Bernard Gautier
  P. O. Box 299
John D. Gautier
  312 Canty Street
Rex Gordon
  P. O. Drawer AA
George W. Howell, Jr.
  P. O. Box 149
John L. Hunter
  4004 Scovel Road
  52 Cherokee Gardens
Albert S. Johnston, III
  P. O. Box 1087
Ransom P. Jones, III
  Box 1607
William B. Jones
  P. O. Box 100
John M. Kinard
  Box 787
Michael John Kitchen
  1310 Market St. Apt. 131
Earl Leslie Koskela
  Drawer 546
Noble W. Kyle, II
  Box 1451
Jesse Elmo Lang
  Box 481
Dempsey M. Levi
  600 Delmas Avenue
Clinton E. Lockard
  P. O. Box 909
Kenneth W. Martin
  Box 1303
Charles J. May, III
  Box 391
O. L. McLeod
  P. O. Box 1263
C. R. McRae
  Box 1692
Carl A. Megehee
  P. O. Box 787
Roland J. Mestayer, Jr.
  Suite 404
  Pascagoula Moss Point
    Bank Building
Melvin L. Mitchell
  P. O. Box 991
B. C. Moore
  P. O. Box 1056
Joe A. Moore
  P. O. Box 100
Joann Taylor Myers
  2802 Monterey Avenue
William H. Myers
  Drawer AA
Edward S. Nelson
  Drawer 1529
Robert H. Oswald
  P. O. Box 189
William J. Palmer
  714 Watts Avenue
Judge Merle F. Palmer
  Box 59
Roy W. Pike
  714 Watts Avenue
Charles Pitcher
  Box 1862
William J. Powers, Jr.
  Box 1267
Ralph W. Pringle
  3105-B So. Pascagoula St.
Willard L. Richardson
  Box 966
Kenneth B. Robertson
  P. O. Box 1445
Ernest R. Schroeder
  P. O. Drawer 1529
Harold M. Seamen
  2303 9th Street
Lloyd Y. Sexton
  5006 Telephone Road
Frank E. Shanahan, Jr.
  Box 1447
George M. Simmerman
  P. O. Drawer D
David A. Stewart, Jr.
  Box 635
David D. Thomas
  Box 1451
Henry L. Tillman
  Box 1516
Judge L. A. Watts
  County Court Jackson Co.
  P. O. Box 244
Pat H. Watts, Jr.
  P. O. Drawer 1499
Charles J. Weeks
  Box 546
Karl Wiesenburg
  Box 26
Roy C. Williams
  P. O. Box 787

Edmund A. Wilson
P. O. Box 415
W. Roberts Wilson, Jr.
Box 1507
Fielding L. Wright, Jr.
Box 1287

PASS CHRISTIAN

Warren Harding Adams
c/o W. J. Adam
C. Randall Jones, Jr.
P. O. Box 283
Frank P. Wittmann, III
105 Hursey Street

PELAHATCHIE

Charles G. Clifford
Route 2 Box 231

PETAL

Thurman L. Clark
P. O. Box 36
Gilbert F. Heinbaugh
Box 261
H. B. Lingle
Box 492
La Fare Murphy
Box 136

PHILADELPHIA

Herman W. Alfred
Key Building
Thomas L. Booker
Route 8 Box 16 KK
Terry Leland Jordan
Box 72
Clayton Lewis
P. O. Box 162
Clayton T. Lewis
P. O. Box 162
William M. Mars
Key Building
Wilburn D. Moore
Box 305
Wilburn Davis Moore, Jr.
Box 305
Joe Henry Mulholland
Box 337
Judge Robert Prisock
Chancellor
Joe M. Ragland
Route 7 Box 21
Bobby F. Sanders
Box 183
Laurel G. Weir
Box 156
William G. Yates, Jr.
P. O. Box 54

PICAYUNE

Delos H. Burks
111 East Canal Street
Sam P. Cooper, Jr.
P. O. Box 125
Emile J. Gex, Jr.
620 Stovall Avenue
Charles R. Holladay
P. O. Box 177
Robert Rip I. Prichard, III
P. O. Box 269
Leilas Terrell Simpson
309 North Main Street
Lonnie Smith
P. O. Drawer 1076
L. Jack Stewart
Box 608
Ray M. Stewart
P. O. Box 269
Edward H. Stevens
Box 279
Monroe David Tate, II
108 East Canal Street
Robert J. Williams
P. O. Box 189

PLANTERSVILLE

Tulane E. Posey, Jr.
Route 1
James E. Bost
P. O. Box 148
145 West Marion Street
Jackson D. Doty
Box 476
William A. Grist
P. O. Box 118
Joe Ray Henderson
P. O. Box 217
Boudie A. Jaggers
P. O. Box 364
Byrd P. Mauldin
512 South Main Street
William Fred Randle
512 Liberty Street
James Lamar Roberts, Jr.
P. O. Box 487
William Lowrey Sneed
512 South Main
Charles D. Thomas
First National Bank Bldg.
Judge T. Fred Wicker
First Circuit Court
District
Post 1
Joseph E. Winston
Box 42

POPLARVILLE

David R. Smith
Box 393
Martin T. Smith
P. O. Box 393
Ellis C. Stuart, Jr.
Box 304
E. B. Williams
Williams Building
E. B. Williams, Jr.
Williams Building
Lampton O. Williams
P. O. Box 113

PORT GIBSON

Jake Louis Abraham
Route 1
Joseph Davenport, Jr.
Edwin D. Davis
Box 602
Joseph Turpin Drake
Robert Douglas Gage, III
Box 224
P. M. Watkins
2nd Floor Person Bldg.
Karl Weil

PRENTISS

Joseph Dale
P. O. Box 518
Onette E. W. Johnson
Drawer C
Donald G. Kruger
P. O. Drawer 11
Floyd P. Smith
Box 357

PURVIS
William E. Andrews, Jr.
Box 306
Elmer A. Canfield
Box 188
Jesse W. Shanks
Box 367
Van Carlton Temple, Jr.
Court House Square

QUITMAN
Robert E. Covington, Jr.
Box 168
G. F. Dabbs, Jr.
P. O. Box 199
G. F. Dabbs, III
Box 199
Billy Ernest Harris
Box 304
Andrew J. Reese, Jr.
Box 231
Tally D. Riddell
Box 199
Charles W. Shepherd
P. O. Box 359
J. E. Shirley
Box 25
Peter K. Smith
200 A So. Archusa Ave.

RALEIGH
S. W. Craft
Homer Currie
Crymes G. Pittman
P. O. Box 265
Luther David Pittman
Eugene C. Tullos
P. O. Box 74
Jerry Lawrence Yeager

RAYMOND
James H. Adams
G. Robert Ferguson
P. O. Drawer 89
William W. Ferguson
Box 300
Hugh B. Gillespie, Jr.
P. O. Box 146
Hugh B. Gillespie, III
Drawer 420
Andrew John Hannon
Route 1 Box 100
Thomas Van Magers
Faculty Drive
Hinds Junior College
Joe G. Moss
Box 144
John Bell Williams
P. O. Drawer 380

RICHTON
Louie F. Ruffin
P. O. Box 421

RIPLEY
Judge William H. Anderson
Chancellor
Benton W. Elliott
Robert William Elliott
George W. Floyd, Jr.
Robert Sidney Hardin
H. G. Ladner, Jr.
120 Jefferson
Thomas E. Pegram, Jr.
P. O. Box 26
Marion D. Roten
Box 375
Fred B. Smith

ROLLING FORK
E. C. Clements
210 Locust Street
Rush M. Clements
210 Locust Street
Herman C. Glazier, Jr.
Box 368
Albert V. Miller
Box 193
J. Wesley Miller
Box 453

ROSEDALE
Joseph A. Eddins
John W. Land
Box 547
John L. Pearson

RULEVILLE
Robert L. Crook
William M. Pittman, Jr.
646 Floyce Street

SALTILLO
John Leroy Long
Box 128

SARDIS
George C. Carlson, Jr.
P. O. Box 450
William E. Corr, Jr.
P. O. Box 450
Herbert M. Fant
Rebecca Ann Floyd
62 North Main Street
James McClure, Sr.
P. O. Box 246
James McClure, Jr.
P. O. Box 246
Cinclair May
Box 246

SEMINARY
J. Martin Mooney
P. O. Box 256

SENATOBIA
David E. Adams
406 West Main
E. R. Arms
James E. Cahill, Jr.
Box 186
T. V. Speck Dixon
222 East Main Street
Leon Edward Hannaford
Box 364
James Richards Johnson, III
Ward Street
Roy E. Johnson
K M Bldg. 406 Main St.
Herbert Kirkland Moore, Jr.
210 South Ward Street
L. P. Puryear
Judge Dick R. Thomas
205 McKie Street
Nathaniel G. Troutt
210 South Ward Street
Robert Quentin Whitwell
505 A Forrest
Raymond D. Williams
P. O. Box 302

SHAW
Raynold Chiz
P. O. Box 541

SHELBY

C. W. Burke
P. O. Box 88
Wayne Thompson

SOUTHAVEN

Robert Galtin Gilder
Box 55
David A. Gustafson
Box 8
Sandra B. Gustafson
Box 8
Edward Chester Hardin
Box 8
Arthur E. Huggins
P. O. Box 8
Dewitt Russell Jones, Jr.
Box 173
B. G. Perry
1709 State Line Road
Box 188
Thomas H. Pigford
6071 Farminton Dr. East
A. L. Pressgrove, Jr.
1369 Stateline Road
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